SUPREME COURT OF THE UNITED STATES.

No. 407.

THE UNITED STATES, PLAINTIFF,

vs.

JAMES H. BRITTON.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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1 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for said district.

Be it remembered that on the 30th day of August, A. D. 1879, there was filed in the office of the clerk of the circuit court of the United States in and for the eastern district of Missouri a certain transcript of record from the district court of the United States for said district, in words and figures following, to wit:

2 No. 2.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

IN CASE NO. 1584 OF THE UNITED STATES, plaintiff,
against
JAMES H. BRITTON, DEFENDANT.

Be it remembered that, on the 13th day of June, A. D. 1879, the grand jury of the United States of America in and for the eastern district of Missouri returned into the district court of said United States in and for said eastern district an indictment in the above-entitled cause, which said indictment is in the words and figures following, to wit:

Indictment.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the district court of the United States for the eastern district of Missouri, at the May term thereof, A. D. 1879.

The grand jurors of the United States, duly empaneled, sworn, and charged to enquire in and for the eastern district of Missouri, on their oaths present that on the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and seventy-seven, the National Bank of the State of Missouri, in St. Louis, was an association theretofore created and organized under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge
3 of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and was on said twenty-fourth day of March acting and carrying on a banking business in the city of St. Louis, within said district, under the said act of Congress and the acts amendatory thereof, and that James H. Britton was then and there president and one of the directors of said association.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, as president and director as aforesaid, did, on said twenty-fourth day of March, at said district, cause and procure to be then and there received and discounted by said association a certain promissory note, which said note was then and there in the words and figures following:

"$20,835.] ST. LOUIS, *M'ch 24th*, 1877.

"Four months after date I promise to *to* pay to the order of Geo. F. Britton, negotiable and payable at the National Bank of the State of Missouri, in St. Louis, twenty thousand eight hundred thirty-five dollars, for value received, without defalcation or discount, with interest, after maturity, at the rate of ten per cent. per annum.

"J. H. BRITTON."

And which said note then bore the endorsement following: "Geo. F. Britton;" and did then and there apply and convert to the use of himself, the said James H. Britton, as proceeds of said discount
4 of said promissory note, a large sum of money then and there belonging to the funds of said association, to wit, the sum of twenty thousand two hundred and fifty-one dollars and sixty-three cents, and that at the said time the said note was so received and discounted as aforesaid the said note was not then and there well secured, and the said James H. Britton and the said payee and endorser of said note, to wit, one George F. Britton, were then and there insolvent, as he, the said James H. Britton, as president and director as aforesaid, then and there well knew.

And so the jurors aforesaid, on their oaths aforesaid, do present that the said James H. Britton, as president and director as aforesaid, by causing and procuring to be received and discounted by said association the said note was aforesaid, and by the applying and converting to the use of him, the said James H. Britton, the said sum of twenty thousand two hundred and fifty-one dollars and sixty-three cents of the moneys of said association as aforesaid, did then and there, in manner and form as aforesaid, wilfully misapply the said sum of twenty thousand two hundred and fifty-one dollars and sixty-three cents, moneys and funds of the said association as aforesaid, with intent then and there on the part of *them*, the said James H. Britton, president and director as
5 aforesaid, to defraud the said association and certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided and against their power and dignity.

And the jurors aforesaid, on their oaths aforesaid, do further present that on the second day of June, in the year of our Lord one thousand eight hundred and seventy-seven, the said National Bank of the State of Missouri, in St. Louis, was an association theretofore created and organized under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord on' thousand eight hundred and sixty-four, and was on said second day of June acting and carrying on a banking business in the city of St. Louis, within said district, under the said act of Congress and the acts amendatory thereof, and that James H. Britton was then and there president and one of the directors of said association.

And the jurors aforesaid, on their oaths aforesaid, do further present that one George F. Britton was then indebted to said association in a large sum, to wit, seventy-nine thousand four hundred and eight
6 dollars and twenty-three cents, as the maker of five certain promissory notes then unpaid, to wit, a certain promissory note bearing date May 8th, 1871, and payable sixty days after said date last aforesaid, for the sum of twenty-five thousand three hundred and nineteen dollars and thirty-five cents, upon which said note interest in the further sum of three thousand eighty-eight dollars and eighty-eight cents was on

said second day of June aforesaid due and unpaid; a certain other promissory note bearing date March 24th, 1877, payable on demand, for the sum of twenty-six thousand five hundred dollars; a certain other promissory note bearing date April second, 1877, and payable five months after said date last aforesaid, for the sum of three thousand five hundred dollars; a certain other promissory note bearing date April twenty-third, 1877, and payable ninety days after said date last aforesaid, for the sum of eleven thousand five hundred dollars, and a certain other promissory note bearing date May fifth, 1877, payable four months after said date last aforesaid, for the sum of nine thousand five hundred dollars; that said indebtedness of the said George F. Britton, amounting as aforesaid to the said sum of seventy-nine thousand four hundred and eighty dollars and twenty-three cents, was then known to him, the said James H. Britton, president and director as aforesaid; that
7 the said notes were at the respective dates thereof, and were on said second day of June aforesaid, not well secured, as he, the said James H. Britton, president and director as aforesaid, then well knew, and that the said George F. Britton was on said second day of June aforesaid insolvent, as he, the said James H. Britton, president and director as aforesaid, then well knew.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president and director as aforesaid, then well knowing the said indebtedness and the said insolvency of the said George F. Britton as aforesaid, did then and there, as said president and director, receive and discount a certain promissory note for the sum of eight hundred dollars, which said note was then dated the said second day of June, 1877, and was due and payable on the fifth day of August, 1877, and was then signed by the said George F. Britton, as maker, and was then endorsed by him, the said James H. Britton; that the said James H. Britton was then insolvent, as he, the said James H. Britton, president and director as aforesaid, then well knew.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president and director as aforesaid, did then and there pay out of the moneys and funds of said association,
8 as proceeds of said discount to the said George F. Britton, the sum of seven hundred and eighty-eight dollars and forty-five cents, and did then and there, by means of said discount and payment in manner and form aforesaid, wilfully misapply, with intent to defraud the said association and certain persons to the jurors aforesaid unknown, the said sum of seven hundred and eighty-eight dollars and forty-five cents, moneys and funds of the said association, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

And the jurors aforesaid, on their oaths aforesaid, do further present that on the eighteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, the said National Bank of the State of Missouri, in St. Louis, was an association theretofore created and organized under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and was, on said eighteenth day of May, acting and carrying on a banking business in the city of St. Louis, within said district, under the said act of Congress and the acts amendatory thereof, and that James H. Britton was then and there president and one of the
9 directors of said association.

And the jurors aforesaid do further present that one Alfred M. Britton was then, and for a long period theretofore, to wit, from the twelfth day of April, in the year of our Lord one thousand eight hundred and seventy-three, continuously, to the said eighteenth day of May, had been, indebted to said association in the sum of thirty-seven thousand one hundred and twenty-two dollars and sixty-seven cents as maker of a certain promissory note then and during the period aforesaid owned and held by said association, and was then indebted to said association for interest past due on said note and unpaid in the further sum of four thousand five hundred and twenty-nine dollars and one cent, which said note was for the principal sum of thirty-seven thousand one hundred and twenty-two dollars and sixty-seven cents, and bore date Jan'y 1, 1883, and was payable on demand to the order of the Nat'l Bank, State of Mo.; that the said Alfred M. Britton was on the said eighteenth day of May insolvent, and that the said indebtedness was not then well secured.

And the jurors aforesaid, on their oaths aforesaid, do further present that on the said eighteenth day of May there was in the moneys and funds of said association to the credit of the said Alfred
10 M. Britton a large sum of money, to wit, the sum of thirty-six thousand eight hundred and sixty dollars and forty-five cents, and that the said James H. Britton, then having knowledge as president and director as aforesaid, of said indebtedness of the said Alfred M. Britton to said association as aforesaid, and then well knowing, as president and director as aforesaid that the said Alfred M. Britton was then insolvent, and that the said indebtedness was not well secured as aforesaid, and then well knowing, as president and director as aforesaid, that said sum of thirty-six thousand eight hundred and sixty dollars and forty-five cents was then in the moneys and funds of said association to the credit of him, the said Alfred M. Britton, did then and there, as president and director as aforesaid, wilfully fail and neglect to apply and cause to be applied to the said indebtedness of the said Alfred M. Britton the said sum of thirty-six thousand eight hundred and sixty dollars and forty-five cents, so as aforesaid in the moneys and funds of said association to the credit of the said Alfred M. Britton, and did then and there, as president and director as aforesaid, knowingly and wilfully permit him, the said Alfred M. Britton, while indebted to said association as aforesaid, to transfer and assign the said sum of thirty-six thousand eight hundred and sixty dollars and forty-
11 five cents to the credit of the City National Bank of Fort Worth, Texas.

And so the jurors aforesaid, on their oaths aforesaid, do present that the said James H. Britton, president and director as aforesaid, did on the eighteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, in manner and form aforesaid, wilfully misapply the said sum of thirty-six thousand eight hundred and eixty dollars and forty-five cents, moneys and of said association, and that said misapplication was then and there made as aforesaid with intent then and there on the part of him, the said James H. Britton, president and director as aforesaid, to injure and defraud the said association and certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

WILLIAM H. BLISS,
Attorney of the United States
for the Eastern District of Missouri.

And afterwards, to wit, at a regular stated term of the district court of the United States in and for the eastern district of Missouri, begun and holden at the city of Saint Louis, in said eastern district, on the first Monday the fifth day of May, A. D. eighteen hundred and seventy-
12 nine, the following proceedings were had of record in this case on Saturday, the fourteenth day of June, A. D. eighteen hundred and seventy-nine, to wit:

Plea of not guilty entered.

THE UNITED STATES, PLAINTIFF, *ag'st* JAMES H. BRITTON, DEFENDANT. } No. 1589. Indictment for violation of section 5209 of Rev. Stat. of U. S.

This day comes the United States, by district attorney, and also comes the said defendant, by Thomas C. Fletcher, esquire, his attorney, and the said defendant, by his attorney, enters his appearance in this cause and enters his plea of not guilty to the charges as contained in said indictment.

And afterwards, at said regular stated term of said district court, begun and holden as aforesaid, the following further proceedings were had of record in this case on Monday, the sixteenth day of June, A. D. eighteen hundred and seventy-nine, to wit:

Remission of indictment to circuit court.

THE UNITED STATES, PLAINTIFF, *ag'st* JAMES H. BRITTON, DEFENDANT. } No. 1589. Indictment for violation of section 5209 of the Revised Statutes of U. S.

This day comes the United States, by district attorney, and on the motion of said attorney it is ordered that the indictment now pending in this court in the above-entitled cause be and hereby is remitted and transferred to the next regular stated term and session of the circuit court of the United States in and for the eastern district of Mis-
13 souri, to be begun and holden at the city of Saint Louis, in said eastern district, on the third Monday, the fifteenth day of the month of September next (1879), for proceedings thereon according to law. And it is further ordered that the clerk of this court make out and certify to the said circuit court a full, true, and complete transcript of the record and proceedings in said cause.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, Joseph H. Clark, clerk of the district court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto annexed to be a true transcript of the record and proceedings in case No. 1589, A. D. 1879, of the United States, plaintiff, against James H. Britton, defendant, as fully as the same remains on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court at office in the city of Saint Louis, in said district, this 18th day of August, in the year of our Lord eighteen hundred and seventy-nine.

[SEAL.]

JOSEPH H. CLARK,
Clerk of said Court.

14 And afterwards, to wit, on the 29th day of January, 1880, the following demurrer was filed in said cause, to wit:

Demurrer.

In the circuit court of the United States for the eastern district of Missouri.

UNITED STATES OF AMERICA }
vs. }
JAMES H. BRITTON. }

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

Demurrer of James H. Britton to indictment No. 1531.

15 And the said James H. Britton, in his proper person, come' here into court, and having heard the said indictment read, says that the said indictment and the matter therein contained in manner and form *and form*, as the same are above stated and set forth, are not sufficient in law, and that the said James H. Britton is not bound by the law of the land to answer the same, and this he is ready to verify.

Wherefore for want of a sufficient indictment in this behalf, the said James H. Britton prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified.

JAMES H. BRITTON,
CHESTER H. KRUM, AND
SAM'L T. GLOVER,
Their Attorneys.

And afterwards, to wit, on the 10th day of March, 1880, the following proceedings were had and appear of record in said cause, to wit:
Ordered that the following be entered nunc pro tunc as of February 4th, 1880.

THE UNITED STATES, PLAINTIFF, }
vs. } 1531.
JAMES H. BRITTON, DEFENDANT. }

Now, at this day comes the United States, by William H. Bliss, esquire, district attorney, and the defendant being in court in compliance with his recognizance herein, and by his attorneys, this cause came on for
16 hearing. Upon the demurrer of said defendant to the indictment herein, and upon the questions of law arising upon said demurrer, the judges were devided and opposed in opinion. It is now, therefore, order' that the clerk of this court make out and certify to the next term of the Supreme Court of the United States a transcript of the record and proceedings in this cause as fully as the same are described in the certificate of division this day filed.
Memor.—His honor Judge Treat took no part in the hearing of this case.

Said certificate of division being in words and figures following to wit:

Certificate of division.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United State' in and for said district.

UNITED STATES
vs.
JAMES H. BRITTON. } No. 1531.

This is an indictment under § 5209 of the Revised Statutes of the United States, of which the following is a copy:

(See page 2.)

To which indictment a demurrer was interposed as follows:

(See page 14.)

17 And the said demurrer to said indictment coming on to be heard at this term, the following questions arose:

1st. Whether the first count in said indictment charges with sufficient certainty an offence under said § 5209 of the Revised Statutes.

2nd. Whether it was necessary in the said first count to allege that the note therein described as having been fraudulently discounted by the defendant was never paid.

3rd. Whether the said second count in said indictment charges with sufficient certainty an offense under said § 5209 of the Revised Statutes.

4th. Whether the third count in said indictment charges with sufficient certainty an offense under said § 5209 of the Revised Statutes.

On which questions the judges were devided and opposed in opinion; whereupon, upon motion of the plaintiff, by its attorney, that the said points upon which the disagreement hath happened may during the term be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided. It is ordered that the foregoing state of the pleadings and questions be certified to according to the request of plaintiff, by his attorney, and as required by the law in the case made and provided.

Given under our hands and seals this fourth day of February, A. D. 1880.

GEO. W. McCRARY. [SEAL.]
HENRY C. CALDWELL. [SEAL.]

18 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify that the writing hereto attached to be a true transcript of the record and proceedings in case No. 1531 of the United States, plaintiff, against James H. Britton, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this

1st day of September, in the year of our Lord eighteen hundred and eighty.

[SEAL.]

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy.

(Indorsed:) No. 1531. United States circuit court, eastern district of Missouri. United States against James B. Britton. Duly certified copy of the in the above-entitled cause.

(Indorsement on cover:) No. 407. The United States, plaintiff, vs. James H. Britton. E. Missouri C. C. U. S. Filed 18th October, 1880.

OFFICE SUPREME COURT U. S.
FILED
MAR 1 1883
H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

UNITED STATES.
v.
JAMES H. BRITTON. } Nos. 406, 407.

BRIEF FOR THE UNITED STATES.

1st day of September, in the year of our Lord eighteen hundred and eighty.

[SEAL.]

M. M. PRICE,
Clerk of said Court.
By A. P. SELBY,
Deputy.

(Indorsed:) No. 1531. United States circuit court, eastern district of Missouri. United States against James B. Britton. Duly certified copy of the in the above-entitled cause.

(Indorsement on cover:) No. 407. The United States, plaintiff, vs. James H. Britton. E. Missouri C. C. U. S. Filed 18th October, 1880.

17-650
OFFICE SUPREME COURT U. S.
FILED
MAR 1 1883
H. McKENNEY, Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1882.

UNITED STATES
v.
JAMES H. BRITTON. } Nos. 406, 407.

BRIEF FOR THE UNITED STATES.

appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

The defendant demurred to the indictment in each case.

The judges before whom the demurrers were argued were divided and opposed in opinion on each indictment upon divers questions of law, which have been certified to this court for decision.

Before considering the points certified we beg to submit some observations upon section 5209, on which these points have arisen.

Section 5209 is to be found under the title, "National Banks," and forms an important part of the legislation denouncing as criminal acts menacing the stability and prosperity of the national banks, some of which acts had not, theretofore, had a criminal complexion, although not infrequently more dangerous to institutions of that class than the ordinary felonies and misdemeanors.

Congress, forecasting that the well-being and happiness of the nation would be largely involved in the success and efficiency of these banks, and profiting by the past experience of the disasters which had been inflicted on the various communities of the Union by the reckless diversion of capital by bank officers from the purposes of legitimate banking, wisely resolved to protect the national banks, as far as possible, from these abuses by making all such acts of maladministration *criminal*, whether done for the supposed good of the banks or not. In other words, Con-

gress determined to keep the operations of these institutions strictly within the limits of safe and legitimate banking by punishing as criminal every attempt to frustrate that purpose. For example, Congress has not stopped at prohibiting these banks to speculate in real estate or their own stock, but has gone farther and enacted (section 5209) that such misappropriation should be criminal.

Such, we maintain, is the effect of the provision that any willful misapplication "of the moneys, funds, or credits" of a bank should be a misdemeanor punishable by imprisonment.

In United States v. Taintor (11 Blatchford, 374) the court, taking the same view as we do of section 5209, says:

> A design to make criminal acts done *without reference to personal advantage* is thus clearly disclosed, and it appears that the intention of the statute was to cover cases of unlawful dealings with the funds of the bank by its officers, *although without a corrupt motive*.

Again:

> It is, indeed, true, that this construction of the statute under consideration imputes to the legislature the policy of making some acts criminal which may not have been before classed as crimes; and if, as it seems to be here suggested, the moral sense of the business community has become so blunted that such acts as this defendant is conceded to have committed have come to be considered "innocent or even praiseworthy," the urgent need of the adoption of such a policy affords good ground for supposing that its adoption was intended by the statute.

Section 5209 makes it an offense for any officer or agent of a national bank—

I. To "embezzle, abstract, or willfully misapply" the moneys, funds, or credits of the bank.

II. To put in circulation the notes of the bank or issue a certificate of deposit, draw an order or bill of exchange, make an acceptance, assign a note, bond, draft, bill of exchange, mortgage, judgment, or decree, without the authority of the directors.

III. To make a false entry in a book, report, or statement of the bank with intent, in either case, to injure or defraud the association or any other company, body, politic or corporate, or any individual person, or to deceive any affairs of the bank or any agent appointed to examine the affairs of the bank.

IV. For any person to aid or abet any officer, agent, or clerk in any violation of this section.

A labored attempt is made by the counsel for the defendant to show that under this section embezzlement, abstraction, and willful misapplication are the equivalents of one another. But this reading cannot be supported. Each of these terms has its own distinct sense, and each is employed for a different purpose.

Embezzlement is a term well understood. It is the creature of statute and was introduced to supply certain defects in the law of larceny which did not extend to some cases of misappropriation by servants and bailees. The idea involved in embezzlement, and running through the English and American legislation on the subject, is misappropriation coupled with some violation of trust or confidence. It is, therefore, not difficult to understand in what sense Congress intended to use the term in applying it to the officers and agents of the National Banks.

"Abstract." Worcester defines the verb to abstract thus: To take away surreptitiously from the property of another,

as to abstract money or goods from a parcel. Webster's definition is: To take secretly for one's use from the property of another, to purloin, as to abstract goods from a parcel or money from a bank. In the 5th Ed. (London, *anno* 1872,) of Wharton's Law Lexicon, *abstract* is they defined, "an abridgment or epitome; *also, a purloining;*" thus showing that counsel opposite are at fault in supposing that this word has no place in legal technology. Of course, the word has other senses, but this is the only one in which Congress could have used it here. That the word should be taken in its plain ordinary acceptation, unless the context prevent it, is required by a settled rule of interpretation.

Willful misapplication.—This offense differs from the other two with which it is grouped in this, that the misappropriation covered by these latter must be committed *animo lucrandi*, but the offense of willful misapplication of the funds or credits of a bank cannot be committed *causa lucri*, for the presence of that intent brings the act of misapplication under the category of embezzlement or abstraction.

In closing these general observations it occurs to us to say that the briefs of the learned counsel for the defense treat these cases as though they were here on writs of error, and, consequently, as though all the questions raised by the demurrers were before this court as they were before the court below.

But, as the jurisdiction of this court is limited to the questions properly certified from the court below, we shall confine ourselves to the consideration of these questions only in their order.

It is to be regretted that the learned counsel for the de-

fense had not also treated these cases in their briefs with direct reference to the points certified. Their omission to do so has left the prosecution *to conjecture* their views as to some of these points.

We will now consider the questions presented for decision.

POINTS CERTIFIED IN CASE NO. 406.

FIRST.

Whether it was necessary, in the counts of said indictment charging a fraudulent purchase by the defendant of certain shares of the capital stock of said association, to state for whose use the purchase was made, and whether, where it is charged in the indictment that the purchase of stock was made for the use of the bank, such averment vitiates the indictment.

The counts charging purchases of stock without averring for whose use such purchases were made are from 37 to 76, inclusive (R., pp. 32–54). And these, again, differ among themselves in this, that some of them, viz, from 37 to 55, inclusive, contain the averment that the misapplication of funds was made with the intent to injure and defraud the bank and certain unknown persons, whereas the remaining counts, viz, from 56–76, inclusive, contain no such averment.

The first question to be considered is, whether it is fatal to the counts in question that they do not aver for whose use the stock was purchased by the defendant?

The offense created by the statute is that of willful misapplication of the "moneys, funds, or credits" of any national bank by its president or other officer or agent "with intent to injure or defraud."

Undoubtedly, an indictment for this offense must describe it with convenient certainty, and would not be sufficient if in the language of the statute simply, according to the general rule, that rule being subordinate to the still higher one requiring all accusations to be specific, that the accused may not be surprised in his defense, that the court may know what judgment to pronounce, and that the record, without resort to extrinsic aid, may suffice to support the plea of *autrefois acquit* or *autrefois convict*, should the same matter be stirred again.

If, then, the omission in these counts of any averment of the person for whose use the purchase of stock was made is fatal to them, it must be because such an averment *is necessary to the identification of the offense* sought to be charged.

Looking, now, at counts 37 to 56, inclusive, upon which alone the question propounded arises, we find that each of them avers a purchase of stock by the defendant with the bank's funds, stating, at the same time, the name of the person registered in the bank's books as then owner of the stock, and then averring that the defendant, in making such use of the bank's funds, *willfully misapplied* them, with intent "*to injure and defraud*" the bank and certain unknown persons.

The averment in each of these counts, that the willful misapplication of the bank's funds was made with intent to injure and defraud the bank and certain unknown persons, is quite sufficient to show that the grand jury have not gone upon insufficient premises, and the superaddition of an averment of the name of the person for whose use the

funds were misapplied would only serve to introduce greater particularity, and thereby increase the danger of variance, without answering any practical end, everything necessary to the identification of the offense having been already averred. Therefore, when the law makes fraudulent intent an element of an offense, it does not require an averment in the indictment of the particular means of fraud the accused had in contemplation, for the reason that such stringency would only tend to defeat the ends of justice. (United States *v.* Simmons, 96 U. S., 364.) The indictment shows with due particularity the act constituting the offense of misapplication of the bank's funds, and the only complaint of it is that it is not equally specific *quoad* the inducement to the criminal act—the object of crime, which the law never regards as an element of crime, although the incentive to it.

Says Sergeant, J., in Sherban *v.* Comm. (8 Watts, 213):

> It is a general rule that in all indictments the charge must be positively averred: but in what cases it is or not sufficiently averred is not ascertained with precision, and must be left, in a great measure, to the legal discretion of the court. (2 Hawk P. C., 228.) Indictments require only the same certainty as declarations, namely, certainty to a common intent in general, and not certainty in every particular as is required in pleading an estoppel. (Co. Litt., 303; 2 Str., 904; 1 Chitt. Cr. Law, 169.) * * * It is sufficient in indictments that the charge be stated with so much certainty that the defendant may know what he is called on to answer, and that the court may know how to render the proper judgment thereon. Over nice exceptions are not to be encouraged, especially in cases which do not touch the life of the defendant. (1 Chitt. Cr. Law, 170, 221; 2 Hale, 178.)

In reply to an objection to an indictment on the ground of want of particularity, the supreme court of Indiana,

after saying that the indictment contained enough to identify the offense, added :

> To require the State to be more particular would expose her to the risk of variance on the trial, facilitating, unnecessarily, the escape of the guilty. (2 Carter, p. 306, State *v.* McCormack.)

The remaining question under the first article of the court's certificate is, "whether, where it is charged in the indictment that the purchase of stock was made for the use of the bank, such averment vitiates the indictment."

This averment occurs in counts 77 to 116, inclusive, and *always in conjunction with the averment*—

> That the said shares of stock were not purchased as aforesaid in order to prevent loss upon any debt theretofore contracted with said association in good faith.

Now, inasmuch as section 5201, Revised Statutes, prohibits national banks from purchasing their own stock, except where necessary to prevent loss upon a previously contracted debt, manifestly the purchase of such stock by a bank director for any other purpose is a willful misapplication of the bank's funds, necessarily inferring an injury to the bank, because its interests as a bank must be prejudiced by tying up its capital in that way, and because the act of misappropriation violates the fundamental compact between the stockholders, and subjects the franchises of the bank to forfeiture under section 5239, Revised Statutes. It would seem that this question must be answered in the negative.

SECOND.

> Whether it was necessary in the said counts to allege that the purchase of stock was not made in order to prevent loss on some previously contracted debt.

We submit, that whenever the averment of willful mis-

application of the bank's funds in the purchase of its stock is accompanied by the averment of intent to injure and defraud, that this is equivalent to the allegation that the stock was not purchased to prevent loss on a previously contracted debt, and hence that no such averment was necessary. But while this question might naturally arise on the *omission* of such an averment in some of the counts, we do not see how the *presence* of it in others can be a ground of controversy, for the principle *utile per inutile non vitiatur* applies generally as well to criminal as civil procedure, should it turn out that it was unnecessary to make such an averment.

THIRD.

Whether it was necessary in the said counts to set forth the means by which the defendant, as president of said bank, possessed himself of the moneys of the bank which he employed in purchasing said stock.

The offense is willful misapplication of a bank's money with intent to injure or defraud the bank. The *quo modo* in which the accused got control of the money is clearly no part of the offense any more than is the way in which the murderer came by the fatal weapon used by him, and need not be covered by an averment. The getting control of the money of the bank is one thing, and may involve delinquency, but the misappropriation of such money is quite another and a more criminal thing.

No such averment is necessary in indictments for embezzlement (Whart. Prec., Indt., 466–469). As we have already said (*supra*), such particularity is not called for to identify the offense, the whole office of the indictment,

and could only have the effect of lessening the probability of a conviction by increasing that of a variance.

In an indictment for malicious mischief the means employed need not be stated (3 Blackf., 346, State *v.* Merrill); and in an indictment for receiving a dead body for dissection, which had been unlawfully disinterred, 'twas not necessary to aver specially the place of burial or the name of the person from whom the body was received, the court saying that the fact to be proved was "*that defendant received it*" (5 Parker, C. R., 141, People *v.* Graves); and we say, here, the fact to be proved is that defendant made a specific misappropriation of the bank's money; and, as evidence touching the person for whose use the money was misapplied would have no tendency whatever to establish the *factum probandum*, it follows that it would be bad pleading to put an averment to that effect in the indictment.

FOURTH.

Whether it was necessary to charge in the said counts that the defendant, as president of the bank, was in possession of the funds of the bank, in addition to charging misapplication of said funds.

Certainty to a certain intent in general is all that is necessary in an indictment, and where one fact appears by necessary implication from another fact the former is averred with sufficient certainty, especially where the offense charged is under the grade of felony. There can be no misapplication of money by him who has it not. (United States *vs.* Mills, 7 Pet., 138.)

FIFTH.

Whether the counts of said indictment, charging the fraudulent purchase by the defendant, as president of said banking associa-

tion, of certain shares of stock, in trust for the use of said association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said association in good faith, alleged with sufficient certainty an offense under said section 5209 of the Revised Statutes of the United States.

We have already said enough to show that this question should be answered in the affirmative, the identification of the offense in the indictment being complete. But it must be noted that the act of purchasing is charged with an intent to *injure* as well as defraud, so that, whether fraudulent or not, there can be no two minds as to its injuriousness upon grounds already stated under the first point. The counts referred to are from 77 to 116, inclusive. It is to be regretted that this question is not more specific.

SIXTH.

Whether count No. 116 of the said indictment charges, with sufficient certainty, an offense under said section 5209 of the Revised Statutes of the United States.

This count charges a willful misapplication by the defendant of a large sum of money in the purchase of certain shares of stock which were held by him in trust for the bank, but not to secure a previously contracted debt, and, therefore, upon an illegal trust, and identifies the offense completely by averring the name of the person who was the registered owner of the stock at the time of the purchase. We have said enough already (*supra*) to show that such an employment of the funds of the bank by the defendant amounts to the offense of willful misapplication under section 5209.

To constitute the offense no intent to injure or defraud is necessary to be established, the willful misuse of the bank's money being alone sufficient to subject a bank officer to the penalty denounced by the statute.

SEVENTH.

Whether it is necessary, in an indictment under section 5209 of the Revised Statutes, charging willful misapplication of the funds of a banking association, to allege that such misapplication was with intent to defraud.

We have already said a good deal for the purpose of showing that neither the intent to injure nor to defraud entered into the offense of willful misapplication of the moneys, funds, or credits of a national bank.

In our view the only offense required to be laid with such an intent by section 5209 is that of making a false entry—

In any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, OR to deceive any officer of the association, or any agent appointed to examine the affairs of any such association.

Now, with a view to narrowing the scope of this section to suit the purposes of the defense, it is urged that it was the legislative intention to require that every offense enumerated in the section should be charged with the intent to injure or defraud; and, as a consequence, that the offense of embezzling the moneys, funds, or credits of a bank must now be laid, absurdly, with an intent which is necessarily involved in the conception of the crime, and which has never before been required under statutes of embezzlement any more than in indictments for larceny.

In like manner this reading of the section requires that the offense of abstracting the funds or credits of a bank should be laid with an intent which enters of necessity into the definition of the offense.

But while such a requirement would be only useless and and senseless in cases of embezzlement and abstraction, it would be exceedingly harmful if applied to the offense of willful misapplication, and destroy a penal sanction upon which Congress, no doubt, relied to make effective certain prohibitions intended to keep the officers of banks from deviating from the purposes of the law. To hold that the offense of willful misapplication must be laid with the intent to injure or defraud would be equivalent to a refusal to give any significance whatever to the words "willfully misapply," except such as would make them synonymous with embezzle and abstract, whereas it is the first duty of the expounder of a statute to give effect to every word, if possible.

But the argument in support of the construction contended for proves too much, for by the same reasoning we are compelled to say that Congress must have contemplated that the intent to deceive some officer of an association or some agent appointed to examine its affairs might form an element in any one of the enumerated offenses, which seems absurd.

The application of the defendant's theory to the second class of offenses named in section 5209 amounts to a *reductio ad absurdum*. This class of offenses consists in putting forth a bank's circulation, issuing a certificate of deposit, drawing an order or bill of exchange, making an acceptance, or assigning any note, bond, draft, &c., "*with-*

out authority from the directors." If, then, the offense be to do any one of these things, with intent to injure or defraud, without such authority, it would seem to follow, necessarily, that the doing any one of them *with such authority* would be *no offense*, albeit done *with the intent to injure or defraud*.

The violent and strained construction given this part of the statute by one of the learned counsel for the defense in order to avoid the absurd result just pointed out is, of itself, enough to show the unsoundness and unreasonableness of his contention. (*Vide* Mr. Krum's brief, pp. 39, 40.)

But it has been held that because the statute declares it shall be a misdemeanor for any one "*with like intent*" to aid or abet any officer, clerk, or agent in any violation of "this section," it is necessary to hold that a principal offense cannot be committed either without a "like intent." But certainly, the meaning of the main body of the statute is not to be overborne in this way by resorting to a merely literal interpretation of its conclusion. Where the intention is clear the words must be made to bend to that intention. How often is it that to effectuate the meaning the words of a statute are taken distributively, on the principle *reddendo singula singulis*, or that words of reference, such as "with like intent," are restricted in sense so as to subserve the legislative purpose? For example, the highway act (5 and 6 William IV, c. 50) imposed highway rates on all property liable to the poor rate. Section 113 of the act provided that "nothing in this act contained" should apply to any bridges or roads which were paved, repaired, or cleansed, broken up or di-

verted, under the provisions of any local act of Parliament. It was held that these words did not relieve such bridges from ratability, but referred merely to such parts of the act as dealt with paving and repairing. (Wilberforce on Statutes, London, 1881, p. 188, citing R. *v.* Paynter, 13 Q. B., 399.) So we say here the words "*with like intent*" must be held to refer only to the offense of making a false entry, that being the only offense named in section 5209 which is required to be laid with any particular intent.

EIGHTH.

Whether the purchase of stock in violation of section 5201 of the Revised Statutes of the United States, if made with intent to defraud, and by one or more of the officers of the bank named in said section 5209 of the Revised Statutes, is a crime punishable under the latter section.

A purchase of stock in violation of section 5201 Revised Statutes by the president of a bank with the funds of the bank is clearly a misapplication of such funds, and necessarily punishable under section 5209 Revised Statutes, whether done with or without fraud, if done willfully.

NINTH.

Whether those counts which cover alleged false entries sufficiently state an offense under section 5209.

Reference is here made to counts 1 to 35, inclusive, and 118, which are founded respectively on the provision in section 5209, which makes it penal for a bank officer to make a false entry in "any book, report, or statement of the association," with intent, *inter alia*, to deceive any agent appointed to examine the affairs of any such association.

It is not indicated by the court below wherein these

counts are deemed defective, nor does it seem that they are wanting in anything necessary to bring the matters charged within section 5209. They aver all the elements of the offense as given in the statute, together with such circumstances as suffice to identify it.

Count 117 also comes under the ninth proposition of the court's certificate, and is identical with the counts just mentioned, except that in it the false entry is laid with the intent to injure and defraud the bank itself, which is also penal.

Unless we are much mistaken, the court will not experience the difficulty, which exercises the defense, of understanding how a party can make a false entry with intent to deceive any agent who might thereafter be appointed by the Comptroller of the Currency. The statute says, "Any agent appointed," which, as we think, very plainly means any agent appointed at the time of the entry *or afterwards*. According to the theory of the defense a false entry made before the Comptroller had appointed any bank examiners at all, was *no offense under* the act.

Nor do we see why the meaning of the false entries may not be explained by averment. Certainly extrinsic evidence is always admissible to explain words or expressions having a technical or otherwise restricted sense and whatever it is necessary to prove must be covered by averment in the declaration or indictment.

We do not understand that the indictment must show the particular way in which the false entry is a means of fraud or deceit. It is enough if the averment be that the false entry was made with the intent to injure and defraud, supposing, *argumenti gratia*, that it does not appear in this

indictment how the false entries have defrauded or deceived. The offense is charged in the language of the statute, and with a particularity sufficient to identify it, and the defendant cannot be in doubt as to the nature of the charge against him. To go further would only increase the danger of variance and answer no good end. (United States *v.* Simmons, 96 U. S., 364.)

The generality of this point and the omission of the defense to discuss it separately cause some apprehension that we may have failed to treat some question arising under it that may have escaped us but occur to the court.

POINTS CERTIFIED IN CASE NO. 407.

FIRST.

Whether the first count in said indictment charges with sufficient certainty an offense under said section 5209 of the Revised Statutes.

This count sets out by way of inducement the organization of the bank, and that the defendant was its president and one of its directors. It then avers that the defendant caused to be received and discounted by the said bank a certain promissory note for $20,835, made by the defendant and payable at four months to the order of one George F. Britton, and by him indorsed; that defendant applied the proceeds of said note to his own use; that the said note was not well secured, both the maker and indorser being insolvent, as defendant well knew, and that defendant willfully misapplied said money with intent to defraud the bank and certain persons unknown.

The questions then, are whether the conversion of the bank's money by the president, after obtaining it upon the security of an indorser whom he knew to be insolvent,

in like manner as himself, was a willful misapplication of the money so obtained with intent to defraud the bank, and, if so, whether the indictment charges the offense with sufficient certainty.

As the defendant could not denude himself of his fiduciary relation to the bank, the money received by him as the proceeds of the discount was as much impressed with a trust in his hands, after being so received, as before it was paid to him by the bank. Can there be a doubt, then, that his applying the money to his own purposes in the circumstances mentioned, subjected him to the penalty of the statute? Was not his act a willful misapplication of the bank's money in circumstances not amounting to embezzlement or abstraction? It is misappropriations of this sort by bank officers that have done much to shake confidence in those institutions, and it would seem reasonable to conclude that it was the purpose of Congress to protect the national banks against this kind of abuse which had become so common.

That the offense is charged with sufficient certainty, is clear, every fact necessary to its complete indentification being averred in the indictment.

FOURTH.

Whether the third count in said indictment charges with sufficient certainty an offense under said section 5209 of the Revised Statutes.

This count charges the defendant with willful misapplication in this, that knowing one Alfred M. Britton to be indebted to the bank in a large sum of money and to be insolvent, he, the defendant, allowed the said Alfred M. Britton to assign and set over to another bank a large

sum of money which was at the credit of said Alfred M. Britton in defendant's bank.

No doubt this count proceeds on the principle that a bank has a lien by law on the balances of its debtors, and that the money in question was potentially the bank's, and might have been applied to the debt due by Alfred M. Britton. For the security of the bank, the money in question was the money of the bank, and its improper application would be an offense under the statute. Indeed, the most that Alfred M. Britton had was *a credit*, a demand only, and, consequently, the money that was paid him, indirectly through the assignment, with the defendant's concurrence and permission, was the bank's in the fullest acceptation of the term. This must follow from the universally established principle that the relation between banker and customer is that of debtor and creditor only. It is submitted that this count is not wanting in certainty.

Notwithstanding the derisive comments of the learned counsel for the defense upon this count, we maintain that it is good in form and substance, for that the acts charged in the indictment show that the defendant was, as president and director of the said bank, aiding, abetting, consenting, and concurring in the act of Alfred M. Britton in transferring and removing the credit in question from the control of the bank as a means of security and satisfaction for the debt due the bank by him, the said Alfred M. Britton, and, consequently, that the transfer of the said credit was an act of willful misapplication of the funds, or credits of the bank by him, the defendant.

WM. A. MAURY,
Assistant Attorney-General.

OFFICE SUPREME COURT U. S.
FILED
NOV 3 1882
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

THE UNITED STATES
vs.
JAMES H. BRITTON.
} *Nos. 406, 407.*

On Certificate of Division of Opinion from the Circuit Court of the United States for the Eastern District of Missouri.

BRIEF OF CHESTER H. KRUM,

Of Counsel for Defendant.

LEVISON & BLYTHE STATIONERY CO. PRINT, ST. LOUIS.

sum of money which was at the credit of said Alfred M. Britton in defendant's bank.

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Notwithstanding the derisive comments of the learned counsel for the defense upon this count, we maintain that it is good in form and substance, for that the acts charged in the indictment show that the defendant was, as president and director of the said bank, aiding, abetting, consenting, and concurring in the act of Alfred M. Britton in transferring and removing the credit in question from the control of the bank as a means of security and satisfaction for the debt due the bank by him, the said Alfred M. Britton, and, consequently, that the transfer of the said credit was an act of willful misapplication of the funds, or credits of the bank by him, the defendant.

WM. A. MAURY,
Assistant Attorney-General.

17-655

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} *Nos. 406, 407.*

On Certificate of Division of Opinion from the Circuit Court of the United States for the Eastern District of Missouri.

BRIEF OF CHESTER H. KRUM, OF COUNSEL FOR DEFENDANT.

The defendant stands indicted under Section 5209 of the Revised Statutes, for offenses alleged to have been committed by him when president of the National Bank of

the State of Missouri. The indictments contain many counts, and present a variety of questions for consideration. The attention of the court is respectfully asked to a review of the various counts and as brief a presentation of grounds of objection to them as is possible under the circumstances.

The indictment in Record 406 contains one hundred and nineteen counts. These are susceptible of classification for the most part, and I shall accordingly present them in groups, as far as may be possible.

I.

Counts one to thirty-six inclusive, relate to false entries alleged to have been made in one of the books of the association, known as "profit and loss, number six." The defendant was then president of the banking association.

The following are specimens of the material portions of these thirty-six counts:

Number 1. * * * * * * * *

"did make in a certain book then and there belonging to and in use by the said association in transacting its said banking business, and then and there designated and known as "profit and loss, number six," a certain entry to the credit of a certain account known as profit and loss, which said entry was then and there in the words and figures following, that is to say:

"RICHARD L. DICKSON:

"182 days' int., 8 per cent, 132,673,49, to July 1, '76, 5,365 88," and which said entry, so as aforesaid made in said book, then and there purported to show, and did, in substance and effect, indicate and declare, that the sum of five thousand three hundred and sixty-five dollars and eighty-eight cents was then and there received by said association, on account of interest then and there due and payable to said association by one Richard L. Dickson.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said entry made as aforesaid, was then and there false in this, that the said sum of five thousand three hundred and sixty-five dollars and eighty-eight cents was not then and there received by said association on account of interest then and there due and payable to said association from the said Richard L. Dickson, as he, the said James H. Britton, then and there well knew; and that the said entry, so made as aforesaid, was then and there false in this, that

the said sum of five thousand three hundred and sixty-five dollars and eighty-eight cents was not then and there received by said association upon any account from any source, as he, the said James H. Britton, then and there well knew; and that the said false entry was then and there made as aforesaid with the intent then and there on the part of him, the said James H. Britton, to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

Number 11. * * * * * * * *

"did make in a certain book then and there belonging to and in use by the said association in transacting its said banking business, and then and there designated and known as 'profit and loss, number six,' a certain entry to the credit of a certain account, known as profit and loss, which said entry was then and there in the words and figures following, that is to say:

"65,000

21 " " " J. H. Britton, - 77,000—$142,000 - 4,970"

and which said entry, so as aforesaid made in said book, then and there *purported to show*, and did, in substance and effect, indicate and declare that the sum of four thousand nine hundred and seventy dollars was then and there received by said association on account of interest then and there due and payable to said association by one James H. Britton.

"And the jurors aforesaid, on their oaths aforesaid, do further present that the said entry, so made as aforesaid, was then and there false in this, that the said sum of four thousand nine hundred and seventy dollars was not then and there received by said association on account of interest then and there due and payable to said association from the said James H. Britton, as he, the said James H. Britton, then and there well knew; and that the said entry so made as aforesaid, was then and there false in this, that the said sum of four thousand nine hundred and seventy dollars and cents was not then and there received by said association upon any account from any source, as he, the said James H. Britton, then and there well knew; and that the said false entry was then and there made as aforesaid *with the in-*

tent then and there on the part of him, the said James H. Britton, to deceive any agent who might thereafter be appointed by the Comptroller of the Currency to examine the affairs of said association. * * * *"

Number 36. * * * * * * * *

"did make in a certain book then and there belonging to and in use by the said association in transacting its said banking business, and then and there designated and known as 'profit and loss, number six,' a certain entry to the credit of a certain account known as profit and loss, which said entry was then and there in the words and figures following, that is to say:

"J. B. EADS:
"47,452.50
"75,000
"37,000
"35,000
"70,000
——— $264,452.50 - - - - 9,255.84"

and which said entry, so as aforesaid made in said book, then and there purported to show, and did, in substance and effect, indicate and declare that the sum of nine thousand two hundred and fifty-five dollars and eighty-four cents was then and there received by said association on account of interest then and there due and payable to said association by one James B. Eads.

"And the jurors aforesaid, on their oaths aforesaid, do further present that the said entry, so made as aforesaid, was then and there false in this, that the said sum of nine thousand two hundred and fifty-five dollars and eighty-four cents was not then and there received by said association on account of interest then and there due and payable to said association from the said James B. Eads, as he, the said James H. Britton, then and there well knew; and that the said entry, so made as aforesaid, was then and there false in this, that the said sum of nine thousand two hundred and fifty-five dollars and eighty-four cents was not then and there received by said association upon any account from any source, as he, the said James H. Britton, then and there well knew; and that the said false entry was then and there made as aforesaid, *with the intent then and there on the part of him, the said James H. Britton, to injure and defraud*

the said association and certain persons to said jurors unknown. * * * * * * * *"

The statute under which these counts have been found provides: "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or *who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association, or any other company, body politic or corporate, or any individual, person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association;* and every person who, with like intent, aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

I respectfully submit, that all of these counts are bad, and that the demurrer to them ought to have been sustained.

I.

The counts are argumentative and repugnant, and do not state offenses under the statute.

1. They do not allege that interest was due to the association from the individuals named in the respective counts.

Recitals are not substantial averments of facts. Argumentativeness is still a substantial fault in pleading. Positions of facts must be advanced in absolute form, and not be left merely to inference and argument. In trespass for taking and carrying away the plaintiff's goods, the defendant pleaded that the plaintiff never had any goods. This was held to be an infallible argument that the defendant was not guilty, yet that it was no plea.

Doct. Pl. 41;
Dyer, 43 a.

In ejectment, the defendant pleaded a surrender of copyhold by the hand of Fosset, then steward of the manor. The plaintiff traversed that Fosset was steward. This was held to be bad, and that the traverse ought to have been that he did not surrender. If Fosset were not steward, the surrender was void. The traverse was merely an argumentative denial of the surrender.

Woods *vs.* Butts, Cro. Eliz. 260.

The rule in criminal pleading does not differ in any respect from that which obtains in civil pleading.

Sherbon *vs.* The Commonwealth, 8 Watts, 212.

Where the allegation in an indictment was as follows: "taken upon himself to do the act complained of," it was

held that the indictment was defective, as it did not contain, in the words "taken upon himself," a positive averment that the defendant committed the act or offense.

The State *vs.* Perry, 2 Bailey, 19.

The statute was intended to guard against actual fraud. There was not an act denounced as a crime by any of the provisions of Section 5209 which must not have been done with the intent to injure and defraud.

United States *vs.* Conant, Browne's Nat. Bank Cases, 148.

The facts necessary to create the offense must be alleged, and not left merely to inference. As stated before, it is not even alleged that any interest was due from the individual named in the respective counts. If no interest was, in fact, due, how can an entry to the credit of profit and loss on account of such interest have worked an injury to, or a fraud upon, the association? The association received an apparent credit to which it was not entitled; but how was it injured, how could it be thereby defrauded? Were the managers of the association enabled to declare a dividend which had not, in fact, been earned, "and thereby pay a dividend out of capital," instead of paying them from the actual gains of the bank? My answer to this theory is, that *non constat* but that the surplus fund is intact for dividends, however unearned *this* credit. The counts contain no allegation upon which such a theory can be based. It may be open by way of inference, but when guessing at what the prosecution means supersedes positive and direct allegations of fact, as the proper method of pleading, it will be time enough to meet the suppositions of the pleader.

It is not enough that an entry was made in the books of the association. The entry must have been false.

And it must not only have been false, but it must have been made with intent to injure and defraud. The falsity of the entry is alleged to have been in that the sum named and entered as having been received on account of interest, had not, in fact, been received on account of interest. The respect in which the entry is alleged to have been false is, then, merely as to the source from which the sum was received.

2. Count thirty is repugnant, and states no offense under the statute.

If it be conceded, for the purposes of argument, that the allegations of the count are well pleaded, the fact still remains that they are repugnant, and fail to state an offense.

The averment is, that a false entry was made, with intent to injure and defraud the association, and certain persons to the grand jury unknown. Taking, now, the allegation that the entry was made with intent to injure and defraud the association, we find that this allegation is negatived by the other allegation, as to what the entry was and what it indicated. Every one is presumed to have intended the natural consequence of his own acts. If A. embezzles funds of a bank in whose employ he is, the presumption is that he endeavors thereby to defraud the bank. But if A. does an act whose natural consequence is not to work a fraud at all, no allegation of intent to accomplish a fraud can change the character of the act in the least degree. Here the act charged is the making of a false entry. The entry is alleged to have been made to the credit of profit and loss. It is charged that profit and loss was not entitled to such entry, because no such profit had been in fact earned by the banking association. But how could the association be thereby injured or defrauded? Of what has it been deprived? What loss has it thereby suffered? Is it the theory that, by means of such fictitious entries, the man-

agers were enabled to declare a dividend where it had not been earned, and to pay to stockholders from the capital, or *surplus* of other years of the association, instead of from its present earnings? What if they were thus enabled? What of it? Are not the stockholders, in fact, the association? The capital and surplus, and even the deposits of the association, are the property of the stockholders. To deliver to them a dividend out of the capital and surplus is simply to give to them that which is already their own. But the association is thereby neither defrauded nor injured. The process simply changes the custody of funds from the association proper to the individual members of such association.

I am utterly at a loss to understand how a false entry to the credit of profit and loss can work a fraud or injury upon the party in whose behalf it has been made. It will not suffice to say that the allegation is that the entry was made with the unlawful intent, and therefore the act was criminal. It may be alleged that A., intending thereby to injure and defraud B., made him a present of $500, but the character of the act, as shown by the allegation, proves at once that it could not have been done with an evil intent. An act which can not by any possibility work a fraud or injury, can not be changed into a criminal act, or a fradulent act, by a mere allegation that it was done with fraudulent intent. "There are circumstances in which the intended evil act fails of being done, while the act really done is not to be deemed, in law, evil in consequence of the evil intent producing it; under which circumstances no legal crime is committed."

1 Bishop's Cr. Proc., sect. 325.

If an indictment alleged that A., intending thereby to defraud B., falsely represented to him that his (A.'s) name was Moulton, and that thereby the defendant was enabled to obtain certain goods, the property of B., but

at the same time alleged that the false representation had no influence on the mind of B., and that he parted with his goods without any reference to the representation made by the defendant, the indictment would hardly be considered good.

The Commonwealth *vs.* Davidson, 1 Cush. 33.

Had the sagacious body which returned the present indictment, found such as has last been instanced, it would not require much argument to convince the court that the indictors had proceeded upon insufficient premises. And I submit, with confidence, that, in principle, the Davidson case can not be distinguished from that made by the present indictment.

I respectfully urge again the consideration that entries, either to the credit or debit of profit and loss, can not injure or defraud the person or banking association in whose books of account such entries happen to have been made.

The cashier of a banking association may have received funds which belonged to the bank, and may have converted them to his own use, without authority from his principal. The act would work an injury to the association. It would be a fraud upon the association. If the cashier made a false entry in the books of account of the association, in order to cover and conceal the fact of his fraud, there would be room, perhaps, for argument that such entry was also a fraud upon the association. It might be so, as enabling the cashier to conceal his crime. But, even then, the better view would be that the act of appropriation was the fraudulent act. It was that act which defrauded the association, of which the cashier was the employee and agent.

Furthermore, the entry, to have been effective as a cover to the fraud, must have been accompanied by an entry made in some account between the association and some creditor or debtor. A debit to profit and loss must

have been accompanied by a corresponding credit in some other account. A credit to profit and loss must have been accompanied by a corresponding debit in some other account. Otherwise, the book entries could never constitute a fraud.

The count now being discussed alleges that the entry to profit and loss was made with *intent to injure and defraud*. But the entry was limited to the profit and loss account. It was made to the credit of profit and loss; but no corresponding entry was elsewhere made. The cashier credited profit and loss with $9,255.84, but he made no other entries in the books of the association. A profit and loss account is a purely fictitious, or representative account. I respectfully urge that debits and credits to profit and loss signify nothing, in point of fact. I charge an account to profit and loss. It does not follow that the account has been paid, or is absolutely valueless. I credit profit and loss with a given amount. I may not actually have been paid that amount. I may reasonably expect that it will be realized. In either case, I act upon my assumption that what I predict in regard to the claim will be realized. But that I thereby work a fraud upon myself I am utterly unable to comprehend.

So, in The People *vs.* Thomas, 3 Hill, 169, the indictment charged that T., who held a promissory note against J., which was due, called for payment, and, with intent to defraud J., falsely represented the note to have been lost or burned up, whereby the latter was induced to pay it. It was held that the indictment was insufficient to sustain a conviction, as not showing any legal injury resulting to J., nor an intent on the part of T. to work such injury. The ground upon which the ruling was had was, that to cheat one into the performance of a duty neither injured the one thus deceived nor proved an intent to injure on the part of the deceiver.

In The People *vs.* Archer Galloway, 17 Wend. 541, it

was held that, to bring a case within the statute punishing the obtaining of the signature of a person to a written instrument by false pretenses, the instrument must be of such a character as that it may work a prejudice to the property of the person affixing the signature, or of some other person. In this case, the signature was obtained to a void deed. Bronson, J., said: "Although the language" (of the statute) "is general, any written instrument, the writing to which the signature is obtained, must, I think, be one which is not utterly worthless. This statute, like that against forgery, was made to protect men in the enjoyment of their property, and if the instrument obtained can by no possibility prejudice anyone in relation to his estate, it will not be an offense within the statute. If the rule were otherwise, a man might be punished criminally for obtaining the signature of another to a note, title, or any other writing of no legal importance. Although it is not necessary to the offense that the party signing should actually suffer loss or injury, yet the instrument signed must be one which could work an injury to the person from whom it is obtained."

3. The entries complained of in all of these counts have no significance by virtue of their own recitals. But the entries were simply of credits to profit and loss account. Upon their face they carried no evidence of the manner in which the fraud could be effected. The fraudulent character of each false entry is not apparent upon its face. This defect ought to have been supplied by averments as to extrinsic matter, so that the court could see that the tendency of the false entry was to work a fraud or injury.

In The Commonwealth *vs.* Hinds, 101 Mass. 209, the indictment was for forging an instrument of the following tenor: "Boston, August 6, 1868. St. James Hotel. I hereby certify that L. W. Hinds & Co. have placed in my hotel a card of advertisements, as per their agreement by

contract. J. P. M. Stetson, proprietor." But there was no averment of extrinsic matter to show that the instrument was adapted to be used for the purposes of fraud, otherwise than appeared on its face.

Referring to this paper and the allegations of the indictment, the Court say: "It does not purport to be an order for the payment of money, or a voucher which the defendant made use of for his advantage. It does not appear what use was intended to be made of it, or how it could have been used to the benefit of the defendant, or the prejudice of any body else. It plainly asserts, as a fact, a matter which, if true, would apparently be of absolutely no significance or importance. The mere possibility that it might be so used in some way—which can only be surmised—for some undisclosed fraudulent purpose, is not enough to maintain the indictment, even after a plea of guilty. If the fraudulent character of the forged instrument is not manifest on its face, this deficiency should be supplied by such averments as to extrinsic matter as would enable the court judicially to see that it has such a tendency."

Clark *vs.* The State, 8 Ohio St. 630;
Barnum *vs.* The State, 15 Ohio, 717;
The People *vs.* Wright, 9 Wend. 193;
Walton *vs.* The State, 6 Yerg. 377;
The State *vs.* Wilson, 30 Conn. 500.

With respect to the word "purport," it should be well observed that it imparts what appears *on the face of the instrument*, as a want of attention to this meaning of the word has been fatal to many indictments."

2 Russell on Crimes, 803.
Jones' Case, Douglas, 300.
Reading's Case, 2 Leach. 672.

The *purport* of an instrument is that alone which appears on its face.

Gilchrist's Case, 2 Leach. 753.

If the exceptions to count 36 have been well taken as to the alleged purpose of the defendant with regard to the banking association, it follows that they are well taken also with reference to his alleged intent concerning certain persons other than the corporation.

The term, "certain persons unknown to the grand jury," is, at best, somewhat general and indefinite. It conveys to the defendant no idea whatever as to the persons against whom he is said to have intended to work a fraud. If such persons were unknown, the certainty required in criminal pleading demands that the relation of these persons to the banking association should, at least, be shown by proper averments. Were they creditors? Were they stockholders? These are the only classes of persons who could have maintained any relation to the banking association. Stockholders could not be defrauded by a false entry to the credit of profit and loss. Creditors could not be injured by a false entry to the credit of profit and loss. They could not even have access to the books, as a matter of right, short of authority obtained in a judicial proceeding. The relation which creditors have to national banks is well shown by Kennedy *vs.* Gibson, 8 Wall. 498. They cannot even proceed against stockholders to enforce the statutory liability upon the shares held by such shareholders. National banks do not bear the relation of trustees in regard to deposits of money made on general account by customers of such banks. "It is an important part of the business of banking to receive deposits; but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other money."

Bank of the Republic *vs.* Millard, 10 Wall. 152.

The relation between the bank and the depositor, in general, is simply that of debtor and creditor.

Maine Bank *vs.* Fulton Bank, 2 Wall. 252;
Thompson *vs.* Riggs, 5 Wall. 663.

"Certain persons unknown" to the grand jury must have been included within some one of the classes holding some relation to the banking association. But they are necessarily excluded from the class of stockholders. Entries to the credit of profit and loss, which are fictitious, cannot be tortured into a fraud upon stockholders. These mysterious individuals whom the defendant is alleged to have intended to defraud, are excluded from the general class of creditors, and also from the more limited class of depositors who are at the same time creditors. The indictment, therefore, shows, by its own averments, that there was no individual, and no class of individuals, known or unknown, who could have been injured and defrauded by the false entry set out in the indictment. It follows, therefore, that, if there was no one upon whom a fraud could be worked, the defendant could not have had the intent imputed to him, and the indictment stands open to the substantial objection of repugnancy. An indictment for larceny which describes the stolen goods as the property of a person deceased, is insufficient.

United States *vs.* Mason, 2 Cranch C. Ct. 410.

If an indictment for forcible entry charge that A. disseized B., and it appear on the face of the indictment that B. was not seized in fee, it is bad.

2 Hawk. P. C., c. 25, sect. 62.

So an indictment for selling iron by false weights and measures has been held bad for repugnancy, for it was absurd to say that iron could be sold both by weight and measure at the same time.

2 Hawk. P. C., c. 25, sect. 62.

If an indictment charge a man with forging an instrument by which A. was bound to B., it is bad, for A. could not be bound by the instrument if it were forged.

2 Hawk P. C., c. 25, sect. 62.

I respectfully submit, therefore, that the counts under consideration show by their own averments that no fraud or injury could have been worked or caused by the mere entries complained of, whether reference be had to the banking association, or persons alleged to have been unknown to the grand jury. The intent to injure or defraud is made an essential part of the offense. The counts negative the assertion that the act was done with the unlawful intent, by showing upon their face that neither fraud nor injury could result in any manner from the mere untrue entry said to have been made upon the books of the association.

5. All of these counts, save number thirty-six, contain the following averment as to the intent with which the entry alleged to be false was made;

"And that the said false entry was then and there made, as aforesaid, with the intent, then and there, on the part of him, the said James H. Britton, *to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association.*

The statute punishes the maker of a false entry where, among other things, it has been made with intent to deceive "*any agent appointed to examine the affairs of any such association.*"

In regard to this class of counts, I have only to say that, if the rule that the demurrer admits the facts alleged be applicable to these counts, then the total depravity of the defendant, as evidenced by his illimitable attempt to deceive, ought to send him to the penitentiary, on general principles, as being a lawless foe to the whole human race. An intent to deceive any agent who might be appointed after the act had been done, may have been discovered by the grand jury, but I apprehend that the court will hesitate some time before applying the law of contingent remainders to criminal proceedings. Were the defendant required to go to trial upon these counts,

I respectfully submit that neither a bill of particulars, nor a commission *de animo inspiciendo*, addressed against the comptroller of the currency, to determine whether he ever intended to appoint any such agent would be effective to relieve the defendant from the condition of doubt and uncertainty which must obtain in his own mind with reference to the purposes with which he committed the given act. Of course, the grand jury have found the intent. Their indictment evidences, however, somewhat of that fierce and uncontrollable spirit who, "rather than be less, cared not to be at all!" The offense has been stated literally in the language of the statute. It is an easy and expeditious way of dispensing indictments. It is true that this was held in Cook's Case, 17 Wall. 174, that "every ingredient of which the offense is composed must be accurately and clearly alleged." It has also indicated, in a not very obscure manner, that it is an "elementary principle of criminal pleading that, where the definition of an offense—whether it be at common law or by statute—'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars.'"

United States *vs.* Cruikshank, 92 U. S. 558.

"In Maine," says the learned Chief Justice, in the same case, "it is an offense for two or more to conspire, with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison; but we think that it will hardly be claimed that an indictment would be good, under this statute, which charges the object of the conspiracy to have been '*unlawfully and wickedly to commit each, every, all and singular, the crimes punishable by imprisonment in the State prison.*'"

I submit that these counts surely lack the certainty essential to good pleading on the criminal side of the court.

There is no allegation that an agent had been appointed, whose duty it was to examine the affairs of the association. At the time when the entry was made, there must have been such an agent to be deceived. The section reads, "any agent *appointed* to examine the affairs of any such association." The entry must have been made to deceive an agent then in commission. There is no similarity between this statute and that in relation to passing counterfeit money. In the latter case, the intent to be alleged is general. It is an "intent to defraud." But here the intent is limited and special. It is one person—an individual appointed for the performance of a specific duty—who is to be deceived. Hence, I respectfully insist that, however much one may marvel at the profundity of the grand jury in arriving at the intent which moved the defendant to make an entry which could not deceive any one, yet they should be required to go further, and point out the individual against whom the impossible fraud could have been accomplished.

And I respectfully urge, furthermore, that an entry which could not work a fraud could not deceive a bank examiner, and especially one that never was appointed. I insist, without fear of successful contradiction, that an entry to the credit of profit and loss *alone*, could not deceive a bank examiner to any alarming extent. One could hardly entertain a contrary view without involving himself in the most serious doubts as to the soundness and substantial merits of the whole system of national banks. Surely, because this case is on the criminal side of the court, the prosecutor ought not to be allowed to cast himself adrift from the moorings of good pleading, which protect the State, and yet advise the defendant as to the offense which he must meet.

II.

Counts thirty-seven to fifty-six, inclusive, relate to alleged wilful misapplications of moneys of the banking association, with the intent on the part of the defendant to injure and defraud the association.

The allegation is, that the defendant, being then president of the association, * * "did pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit, thirty-four hundred and eighty dollars, out of the moneys and funds then and there belonging to and the property of said association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit, fifty-eight certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of said association to be the property of one Edward Walsh, junior.

"And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president as aforesaid, did then and there, by means of the payment aforesaid, in manner and form aforesaid, wilfully misapply the said sum of thirty-four hundred and eighty dollars of the moneys and funds as aforesaid of said association, with intent then and there on the part of him, the said James H. Britton, to injure and defraud the said association and certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

I respectfully submit the following grounds of objection to this class of counts.

First. The counts do not state whether the purchase was made for the use of the defendant or for the use of the association.

They allege that he was president, but do not state for whom the purchase was made. The absence of the allegation is fatal to the indictment. The counts allege merely that with funds of the association the defendant bought certain shares of the capital stock. Did he buy for his own use? Even then, as will be argued hereafter, he would not have committed a criminal offense unless the funds had been confided to him by the association to be used for the association, and in violation of his trust he had applied the funds to a purchase for his own benefit and advantage. Did he buy for the association? He was president. If he was authorized by the association to buy the stock for the association, and did so buy it with the funds of the association when such course was necessary to secure a debt previously contracted in good faith, then there can be no pretense that he committed an offense in any degree whatever. Section 5201 provides that no banking association shall be the purchaser or holder of its own capital stock, unless such purchase or security shall be necessary to prevent loss upon a debt previously contracted in good faith. It is therefore lawful for a banking association to buy its own capital stock, when the purchase is necessary to save a debt previously contracted in good faith. In the absence of an allegation to the contrary, I assert that I am entitled to assume that the defendant acted for the association. If, then, he was authorized to make the purchase, and did make it in order to save the association from loss on a subsisting debt, he did not commit an offense. The allegation of the intent with which the purchase was made adds nothing to the counts, in this view of the matter.

An act which, from its very nature, implies a commendable intent, cannot be made criminal by a charge that it was done with evil intent. As indicated before, the counts do not allege that the purchase was not made in order to prevent loss on some previously contracted debt. It cannot be necessary to argue this point at greater length. Surely the counts ought to have contained allegations which would have removed the case from the operation of other sections of the statute. Where there are exceptions provided by a given statute to the general operation of the statute, it is a familiar rule of criminal pleading that a person accused must be shown by the indictment to have not been within the designated exceptions. So, where under given circumstances a purchase for the banking association would have been lawful, the pleader must have shown that no circumstances did exist to render lawful the act which formed the basis of the indictment. This seems to be conceded here, from the fact that counts 77 to 116, inclusive, do negative the existence of debts to prevent loss upon which the defendant bought stock for the association. I do not concede that the addition of this averment gives strength to the counts last mentioned. But I do insist that its absence renders immeasurably weaker the counts now under consideration.

Secondly. I assume, as a fundamental principle underlying the relation which a bank president holds to the bank, that he is not, by virtue of his office alone, the custodian of the funds and moneys of the bank.

The National Bank Act does not make the president of a banking association the custodian of its funds. Section 5136 authorizes the board of directors to appoint a president and to define his duties. But the indictment contains no averment whatever as to the duties of the defendant. Therefore, neither the charter of the association nor the action of the board of directors changed, in any manner, the relation of the defendant to the association from the ordinary relation which a president bears to his bank. The cashier is, ordinarily, the custodian of the moneys of a bank. This court have said: "The cashier is the executive officer through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged."

Merchants' Bank *vs.* State Bank, 10 Wall. 604, 650.

"*His ordinary duties are to keep all the funds of the bank, its notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank.*"

United States *vs.* City Bank, 21 How. 356, 364.

But the president enjoys no such power or privilege by virtue of his office alone. The counts of the indictment are silent both as to usages of the association and

grants of authority by the directors to the president. Whatever control over the funds and moneys of the association the defendant may have had resulted, therefore, by virtue of his office alone. But the president of a bank is not in possession, and does not have control of the funds and moneys of the bank by virtue of his office alone. "It is not the appropriate office of the president of the directory of a banking corporation to use its cash or credits for the purpose of settling the demand of its creditors; and in the absence of an authority to transact such business, an assignment made of the property of the corporation, or an order given by him to pay its money to a third person, will not operate to divest the right of the corporation.

Gibson *vs.* Goldthwaite, 7 Ala. 292.

"The cashier is usually intrusted with all the funds of the bank, in cash, notes, bills, etc., to be used from time to time for the ordinary and extraordinary exigencies of the bank. He receives directly, or through the subordinate officers, all moneys and notes. He delivers up all discounted notes and other property when payments have been made. He draws checks from time to time for moneys, wherever the bank has deposits."

Fleckner *vs.* United States Bank, 8 Wheat. 360.

The full significance of the exclusive responsibility for the funds of the bank which the law imposes upon the cashier is shown by the ruling of this court in regard to the liability of the sureties of a cashier for an overdraft allowed by him, even where he had the consent and approval of the directors.

Minor *vs.* Mechanics' Bank, 1 Pet. 46–72.

When money is received by the president of a bank, to be by him deposited in such bank, it cannot be inferred from the mere fact that he is president that he received the money for the bank. Whether he does must depend on circumstances.

Sterling *vs.* The Marietta Co., 11 Serg. & R. 179.

In Olney *vs.* Chadsey, 7 R. I. 225, it was held that the president of a bank has no authority, *virtute officii*, to surrender or release the claims of the bank against any one, and can only derive such authority from the vote of the board of directors, or from their assent, express or implied. The only authority which results from the existence of his office alone is to bring or defend suits in the name of the bank, and to employ counsel for that purpose. He may be expected, by virtue of his office, to give greater personal attention to the affairs of the bank than other members of the board of directors. But he has no more extensive powers or privileges than a mere director, with the exception of his authority over the litigation of the bank. Mr. Morse, in the second edition of his work on Banks and Banking, 146, says that the control of the president of a bank over its property, of any description whatsoever, from real estate down to a naked right to bring an action at law, is of the slightest. I assume, therefore, as a fundamental proposition, upon which this entire case rests, that the defendant, as president, and by virtue of his office alone, was not in possession of the funds and moneys of the banking association. They had not been confided to him by the board of directors. He did not have control or possession of them under any usage which had grown up during the banking operations of the association.

The case made, then, by the counts under consideration is that of a bank-president who possesses himself of moneys of the bank without authority from the association, and applies such moneys to his own uses and purposes.

Does such conduct constitute a wilful misapplication of the moneys of the association, within the meaning of section 5209? I insist that it does not.

The language of the statute is: "Every president, director, cashier, teller, clerk, or agent of any association, who shall *embezzle*, *abstract* or *wilfully misapply*

any of the moneys, funds, or credits of the association," etc., shall be deemed guilty of a misdemeanor.

If the words "embezzle," "abstract," and "wilfully misapply" are properly to be taken as having the same general significance, then there are two cases in the courts of the United States where the language used by the judges, in giving their opinions, is applicable to the present indictment.

Thus, in Van Campen's Case, 2 Ben. 419, Mr. Justice Blatchford says: "Where a president of a bank, charged as a trustee with the administration of the funds of the bank *in his hands*, converts them to his own use, he embezzles and abstracts them, within the statute referred to, unless he shows authority for so doing."

In Conant's Case, Browne's Nat. Bank Cases, 148, Judge Lowell gives the word *embezzle* such meaning as will "distinguish a crime which a person has the opportunity to commit by reason of some office or employment, which may include in its signification some breach of confidence or trust, some misuse of an opportunity of that sort."

From the language used by Mr. Justice Blatchford, it is manifest that the evidence before him in the Van Campen case established the fact that by some action of the board of directors the president was charged with the custody and control of the moneys which he used for his own purposes. He refers to the defendant as a *president charged as a trustee with the administration of funds of the bank in his hands.* The president of a bank is not a trustee by virtue of his official relation alone. A director may be a trustee. But here the defendant, Britton, is not alleged to have been a director. He was merely president. He is not indicted as a director, but as president. Even the cashier of a bank—the executive officer, the custodian of its moneys—is not a trustee by virtue of his office. If a cashier embezzle funds of a bank and invest them, a court of chancery has no power to fasten a trust upon the investment, and to declare the cashier to be a trustee, holding what he purchased in trust for the bank.

Pascoag Bank *vs.* Hunt, 3 Edw. Ch. 583.

By virtue of his office alone, the president is not charged with the administration of the funds of the bank. He does not have the funds in his hands. They are not in his custody. They are not under his control. So that I apprehend that I am justified in the assumption that Van Campen was charged, by some action of the directors, with a particular disposition of the funds of the bank, and that he violated his duty and trust by appropriating the funds to his own use. He was bound to follow the instructions of the directors, who created the trust by confiding to him the funds. He could not depart from such instructions, the learned judge says, without "authority for so doing."

So in the Conant case, the idea of a trust or active relation to the funds of the bank underlies the entire opinion. The office or employment in which the offense of embezzlement can be committed must include a trust or confidence reposed. The offense can only be committed by a breach of the trust—some misuse of an opportunity given by a relation of control over the funds. It will not suffice to say that every one employed or occupied in a national bank can commit the crime of embezzlement, under Section 5209. The teller of a national bank is undoubtedly the custodian of such moneys of the bank as happen to be confided to him during banking hours. But the relation of custodian ends with the close of his labors for the day. The "*opportunity*," whose "*misuse*" shall subject him to the charge of embezzlement and misapplication is lost at once upon the return of the moneys to the general control and possession of the cashier. For this doctrine there is most persuasive authority. And while a teller would be guilty of larceny if he took and appropriated to his own use the moneys of the bank after they had been returned to the cashier, and before they had again come to the teller with the concurrence of the cashier, yet the offense could not be embezzlement or misapplication.

The Commonwealth *vs.* Barry, 116 Mass. 1.

The element of confidence reposed in the defendant must always exist in order to make the offense embezzlement. If the thing embezzled comes to the possession of the servant in the ordinary course of his duty, he is within the statute. If he becomes possessed of it under special instructions from his employer, he is within the statute. But if he receive it without authority, and the taking was not in the line of his service, he is not within the statute. The president of a bank cannot *virtute officii*, take or receive the moneys of the bank. He has no right or authority so to do. His duty is to let them alone. Without authority from the bank, he cannot touch or receive the moneys of the bank without departing from the ordinary course of his duty. By virtue of his office he does not stand in any relation of confidence or trust in regard to the moneys of the bank. Statutes in relation to embezzlement differ. But the element of confidence reposed has been required by the courts as a substantial feature controlling all of the statutes. And in Massachusetts, where a statute provided that "if any person to whom any money, goods, or other property which may be the subject of larceny, shall have been delivered, shall embezzle or fraudulently convert to his own use, or shall secrete, with intent to embezzle or fraudulently convert to his own use, such money, goods, or property, or any part thereof, he shall be deemed, by so doing, to have committed the crime of simple larceny," it was held that where the cashier of a savings bank, in paying a depositor, gave him $100 too much, which sum in excess the depositor fraudulently converted to his own use, the receiver of the money did not commit the offense defined by the statute. The court say that the statutes relating to embezzlement do not apply to cases where the element of a breach of trust or confidence, in the fraudulent conversion of money or chattels, is not shown to exist. The statute was intended to embrace cases where property had been designedly delivered to a person as a bailee or keeper, and had been fraudulently converted

by him. "But in this class of cases there exists the element of a trust or confidence reposed in a person by reason of the delivery of property to him, which he voluntarily takes for safe-keeping, and which trust or confidence he has violated by the wrongful conversion of the property. Beyond this the statute was not intended to go."

The Commonwealth *vs.* Hays, 14 Gray, 62, 64.

I submit that the element of confidence reposed can hardly be found in the case of a bank-president acting by virtue of his office alone. He is charged with no duty of preserving and keeping the funds. He has no authority over them. He cannot interfere with them, save in violation of his plain duty to leave them alone.

In United States *vs.* Taintor, 11 Blatchf. 374, the words *embezzle* and *abstract* are distinguished from the word *misapply*. The former are said to cover acts intended to benefit the doer. The latter covers acts done in the nature of unlawful dealings with the funds of the banking association, even where a corrupt motive is wanting. This conclusion is reached from the use of the word "injure" in the statute. But the court does not pass upon the question now being considered. It was not necessary to do so, because Taintor was cashier, and *virtute officii* in possession of the funds which he misappropriated.

I return, therefore, to the original proposition. As to the situation of the funds, moneys or credits, the words "embezzle," "abstract," and "misapply," have the same significance. *A bank-president cannot embezzle unless the moneys which he takes have come into his possession. He cannot abstract unless there are moneys, funds or credits in his possession from which to take and misappropriate. He cannot misapply unless he has been intrusted with funds which are to be applied in a specified manner, or at least for the general purposes of the association.*

Is not this the meaning of the statute?

The court will observe that the terms used in the statute are not defined by the statute itself. It is a sound rule that when a legislature in this country uses a term, without defining it, which is well known in the English law, it must be understood in the sense of the English law.

McCool *vs.* Smith, 1 Black, 459.

The crime of embezzlement was first denounced by the statute 21 Hen. VIII., chap. 7, and the statute is said to have been the result of an attempt to cure supposed defects in the law of larceny. The application of the statute was restricted to goods confided to servants to keep. But the modern English statutes punish the fraudulent embezzlement by any clerk or servant of any chattel, money or other valuable security, which has been *delivered to, or received, or taken into possession by him*, for, or in the name, or on the account of his master or employer. The American statutes, I believe, without exception, make the crime depend, among other things, upon the fact of having possession of the thing misappropriated. One distinguishing feature, therefore, of the statutes concerning embezzlement is possession by the criminal of the subject of the crime. Even custody is not enough. There must be possession. The statutes creating the crime of embezzlement, say the Supreme Court of Massachusetts, "were all devised for the purpose of punishing the fraudulent and felonious appropriation of property which had been intrusted to the person by whom it was converted to his own use in such a manner that the possession of the same was not violated, so that he could not be convicted of larceny for appropriating it. Proof of embezzlement will not sustain a charge of larceny. * * * If the property is in the actual or constructive possession of the master at the time it is taken, the offense will be larceny, and not embezzlement. * * * In the present case, the defendant, who was employed as a servant, was directed by one

member of the firm who employed him to take a sum of money from him to another member of the firm. He had the custody of the money, but not any legal or separate possession of it. The possession remained in his master. His fraudulent and felonious appropriation of it was therefore larceny, and not embezzlement."

The Commonwealth *vs.* Berry, 99 Mass. 428.

In the case of The Commonwealth *vs.* Wyman, 8 Metc. 247, the defendant was indicted under a statute which provided: If any cashier, *or other officer*, agent or servant of any incorporated bank, shall embezzle, or fraudulently convert to his own use," etc. It was held that the word "officer" was of that comprehensive character as to include, not only the officers in rank under the cashier, but the superior officers also; and that presidents and directors, being officers of banks, and as such within the mischief intended to be prevented, were also within its remedies; and that where they are *properly charged as intrusted* with the property of the bank or of its depositors, they might, on proof of their guilt, be punished for the crime of embezzlement, and not merely of a simple larceny.

The defendant was indicted as president and director of the bank. The indictment alleged that the defendant and the cashier, *by virtue of their respective offices, received and took into their possession* certain moneys, the property of the bank, and embezzled such moneys. The case came back for trial, and a report of the proceedings is preserved in the note to sect. 1907, 2 Wharton on Criminal Law. Mr. Webster argued that the case, under the evidence, did not fall within the statute. Mr. Rogers, on the other side, argued, among other things, that embezzlement did not necessarily imply custody at all. The court held that the question whether the funds had been so intrusted to the defendant as to bring him within the rule laid down by the Supreme Court, was one of fact for the jury. And the court defined to counsel what struck his mind as not constituting an intrusting, under the ruling of the Supreme Court: "If the president and directors of an ordinary country bank, at a regular meeting of the board, with a fraudulent intent to get possession of the moneys of the bank, were to discount

notes, and direct the cashier to pay out the money upon them, knowing them to be worthless, it would be a conspiracy, and not an embezzlement, unless the cashier was privy to the fraud. If the cashier participated in the fraud, it would be embezzlement on his part, and the president and directors would be accessories. If the defendants, acting as president and directors, did the same thing, and no more, and the cashier innocently paid out the money, could it be any more an embezzlement in the defendants than in the president and directors in the case supposed? To test this, if the cashier was party to the fraud, he clearly would be liable for the embezzlement. Why? *Because intrusted with the funds.* Could the defendant in that case be otherwise indicted than as an accessory? *Clearly not, unless he and the cashier had joint possession of the funds.* If, then, the cashier was so intrusted with the funds as to render him liable for embezzling them, can the same funds at one and the same time be regarded, within the meaning of the Supreme Court, *as intrusted* to the defendant, so as to render him liable for embezzling them by an act in which the cashier did not partake?" Upon this expression of opinion by the court, the prosecuting officer, stating that he could not consistently ask a verdict of guilty, abandoned the case.

It cannot be necessary to refer to other authorities to maintain the proposition upon which I rely. Larceny is not embezzlement. It is absurd to say that a man can embezzle that which is not in his possession. Yet that is what the court is asked to say section 5209 means, under the present indictment. I insist that when Congress used the term "embezzle" in the section, it was the intention to use it in its well-known and accepted meaning as then understood by law-makers and the courts. It never was the intention to punish a bank-president for an embezzlement upon facts which establish nothing but larceny. Yet upon this absurd consequence the prosecution relies, under a statute which is the outgrowth of enactments intended to supply defects in the law of larceny.

If reference be made to statutes *in pari materia*,—

statutes punishing embezzlement,—it will be found that they all, either in terms require the element of possession of the thing embezzled, or by the use of the word "embezzle," without further definition, leave the term to be accepted in its ordinary and established meaning.

Thus, section 1734 provides that failure on the part of consular officers to account for moneys *received by them* for the use of the United States, etc., shall constitute embezzlement.

3891. Any person employed in any department of the postal service who shall unlawfully detain, etc., any letter, etc., *intrusted to him*, or *which has come into his possession*, etc., or who shall *secrete* or *embezzle* such letter, etc., shall be punished, etc.

4046. Every postmaster, clerk, or other person employed in or connected with the business or operations of any money-order office, who converts to his own use, etc., is guilty of embezzlement. *And any failure to pay over or produce any money-order funds intrusted to such person shall be taken to be prima facie evidence of embezzlement.*

4053. Any officer or other person employed in any branch of the postal service, having *temporary custody of any money taken from dead letters*, etc., who wilfully neglects to deposit same, etc., is guilty of embezzlement.

5460. If any officers or persons employed at the mints shall embezzle any of the metals at any time *committed to their charge*, etc, or any metals, coins, or other moneys of said mints at any time *committed to their charge*, or *of which they have assumed the charge*, etc., they shall be punished, etc.

5467. Any person employed in any department of the postal service who shall secrete, embezzle, or destroy any letter, packet, bag, or mail of letters *intrusted to him*, shall be punished, etc.

5486. If any guardian, *having the charge and custody of the pension* of his ward, shall embezzle the same, etc.

5488. Disbursing officer who deposits any money *intrusted to him*, in any place, or in any manner, except as authorized by law, etc., is in every such act deemed guilty of an embezzlement of the money.

5489. If the treasurer of the United States, or any public depository, fails safely to keep all money *deposited* by any disbursing officer, etc., it is embezzlement.

5491. Every officer or agent of the United States who, having *received* public money which he is not authorized to retain as salary, etc., fails to render an account, etc., it is embezzlement.

5492. Every person who, having moneys of the United States *in his hands or possession*, fails to make deposit, etc., is guilty of embezzlement.

5497. Every banker, etc., not an authorized depository, of public moneys, who knowingly *receives*, etc., any public money on deposit, or by way of loan, etc., is guilty of embezzlement.

5504. Failure of clerk to deposit moneys *paid into the registry* of the court, etc., is embezzlement.

5505. Every person who knowingly *receives* from a clerk or other officer of the United States Court any money belonging in the registry as a deposit, etc., is guilty of embezzlement.

All through these statutes is found the element of possession, *or having been intrusted with* the property embezzled, as the controlling feature of the offense. And I respectfully submit that there is here found additional reason for the proposition that, in using the word "embezzle," whose meaning was well known before the statute, it was the intention of the law-maker that the word should be understood in the same sense as it was understood before that statute.

Smith *vs.* Harmon, 6 Modern, 143

For, to "know what the common law was before the making of a statute, whereby it may be known whether the statute be introductory of a new law, or only affirmatory of the common law, is the very lock and key to set upon the windows of a statute." Congress could not have meant that one could embezzle that which had not been confided to him. A bank president who has not had the funds committed to his charge is an utter stranger to their possession.

The words "embezzle," "abstract," and "wilfully misapply" are used in the same sense, as far as the situation of the property is concerned.

It has been demonstrated that one cannot embezzle that which has not been confided to his possession. In Van Campen's case, the court say that a bank president charged as a trustee with the administration of the funds of the bank in his hands, who converts them to his own use, *embezzles and abstracts* them, within the meaning of Section 5209, unless he shows authority in so doing. This I respectfully submit, is persuasive authority that the words "embezzle" and "abstract" are used in the the same general sense, as far as concerns the situation of the property.

But here the charge is that the defendant, by the purchase of stock of the bank with the funds of the bank, misapplied such funds. Can one *misapply* that which has not been entrusted to him? Can one *misapply* that which has not been entrusted to him, and to apply which in a particular manner it was not his duty, under the terms of the trust? Misapplication, by its very terms involves the sense of a duty to apply in a particular manner, which duty has been violated. It will not suffice to say that the defendant may have unlawfully taken the funds of the bank, and that, once having obtained possession of them, it was his duty to keep them for the bank, and not to apply them to his own uses.

A bank president certainly can commit larceny of the funds of the bank. He is punishable under the State laws for such offense. Larceny includes a trespass which involves a violation of another's possession. But, if goods are in the hands of a bailee of the owner, and the bailee fraudulently applies them to his own use during the continuance of the bailment, it is not larceny.

The act complained of at the hands of the defendant may have been larceny. It cannot have been misapplication. The funds were not in his possession for any purposes. They were in the possession of the cashier. Without the latter's consent, the defendant possessed himself of the funds. He used them for his own purpose. If, at the time of taking them, his intent was feloniously to convert them to his own use, the offense was larceny, and it was complete at once upon the unlawful taking. The subsequent use by the defendant added nothing to the offense. Even restitution would have not modified the crime. Of course, my suppositions are based upon the allegations of the indictment. I assume that the indictment was intended to convey the idea that the defendant bought the stock for himself. *Nothing could be further from the facts than this allegation.* But I have to deal, now, with no facts other than those which appear in the indictment. I say, therefore, that possibly the defendant committed the crime of larceny. He certainly did, if he committed any offense at all. Of the crime of larceny, the State courts have cognizance. Of the crime of wilful misapplication, the courts of the United States have cognizance. It will hardly be contended, I imagine, that because of the different jurisdictions, therefore a given state of facts constituting an offense can be divided so that where a bank officer took the moneys of the bank under circumstances which, under State laws, would create the crime of larceny, he would be amenable to the Federal jurisdiction because he happened to use the moneys for his own purposes,

and not for those of the bank. I do not propose to contend that an entire offense may not fall within both the Federal and State jurisdiction. But I do venture to assert that a defendant cannot be prosecuted piecemeal under the same state of facts. Larceny is a felony. Wilful misapplication is a misdemeanor. A conspiracy to commit a felony is a misdemeanor. Where one undertakes to commit a misdemeanor by means of a felony, the law stops with the felony.

Rex. *vs.* Evans, 5 Car. & P. 553.

So, when one undertakes to commit a felony through the medium of a misdemeanor, and the felony is consummated, the lesser is merged in the greater offense.

The Commonwealth *vs.* Kingsbury, 5 Mass. 106;
The Commonwealth *vs.* Blackburn, 1 Duv. 4.

And this doctrine was expressly recognized by Mr. Justice Miller in McDonald's Case, 3 Dill. 543. If the defendant stole the funds of the bank, how can this court stop to inquire what he did with them after their felonious appropriation? Congress certainly did not intend to confound all settled notions in criminal procedure.

And this conviction can only be fortified, if anything further can be needed, by the reference which I have made to statute after statute in which embezzlement and misapplication of public moneys are denounced as the same offense, and the crime in each instance made to depend upon the possession of the funds, and confidence reposed in the possessor with reference to such funds.

In a case recently decided by this court (United States *vs.* Hall), it was contended that, under Section 4783, the courts of the United States could not entertain jurisdiction over an appropriation of pension money by a guardian after it had been paid to him for his ward. But the court said this was a mistake; because the guar-

dian did not, and could not have, in the nature of things, the charge and custody of the pension money of his ward until it was paid to him by the government; because he could not, within the meaning of the act of Congress, embezzle the pension money of his ward, or fraudulently convert the same to his own use, in violation of the trust, before the same was paid to him as such guardian; *because, if the theory of the defendant was correct, the act of Congress defined certain acts of such a guardian as an offense, that in the nature of things was practically impossible, which would show that the act of Congress was an absurdity.* In other words, Congress never intended to be understood to say that one could be convicted of embezzlement for a misapplication of a fund before he had assumed any relation of custodian or trustee in regard to such fund. And especially was this to be the case when the fund had never come into the possession of the trustee.

The rule of construction of penal statutes, this court say, in Hartwell's Case, 6 Wall. 396, "does not exclude the application of common sense to the terms made use of in the act, in order to avoid an absurdity, which the legislature ought not to be presumed to have intended. * * * The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature."

Section 5209 provides against two classes of offenses with regard to the moneys and funds of the banking association. I respectfully submit that the first class involves, *ex vi termini*, cases of unlawful conversion where the possession is lawful; and that the second class covers cases where the possession has been unlawfully obtained. The statute provides: "Every president, etc., who embezzles, abstracts, or wilfully misapplies any of the moneys funds or credits of the association." This is the first class. It involves, necessarily, the idea of a lawful custody and possession of the moneys and funds.

Why? *Because the embezzlement is not made to depend upon absence of authority from the directors.* Is misappropriation by the cashier embezzlement and wilful misapplication? If intentional, it certainly is, because he is the possessor of the funds. They are not in his possession by reason of any action on the part of the directors. The things which may be misapplied are "*moneys, funds or credits.*" What are credits? Bills receivable are credits. Under the statute, anything falls within the category which belongs on the credit side of the association's ledger, except moneys or funds. The cashier is in possession of the credits of the association. He can embezzle or misapply them, as being their lawful custodian. The assent or dissent of the directors can neither protect him nor add to his offense. On the other hand, the officer who, *without authority from the directors*, * * assigns any note, bond, draft, bill of exchange, etc., with fraudulent intent, commits an offense which falls within the second class.

The offense depends upon the want of authority. But can the cashier embezzle *credits*, which are *notes*, *bonds*, *drafts*, *bills of exchange*, even where he has the assent of the directors, and yet be protected in the self-same act? In Taintor's case, his offer to prove that the directors approved his embezzlement was refused by all the judges. But the fraudulent assignment of *notes*, *bonds*, *bills of exchange* (*all credits*), which are in his possession *virtute officii* alone, when done with the assent of the directors, is not to be an offense? Surely Congress has not violated every dictate of common sense. Its legislation cannot have been unnecessary. It cannot be construed so as to make it absurd. Congress cannot have intended to provide that a cashier could do an act which, with or without the assent of the directors, would be embezzlement, and yet that if the same act were authorized it should be lawful. Such a construction makes nonsense of the statute.

What meaning, then, shall be given to the statute? Manifestly this:

That, in the case of a cashier, the terms "embezzle," "abstract" and "misapply" involve the lawful possession, in the first instance, of the moneys, funds or credits misappropriated. The assent of the directors cannot diminish, their dissent cannot increase, the scope of the offense. If the act done be embezzlement, what they know or do about it is utterly immaterial. But when the thing misappropriated is not in lawful possession in the first instance, as where the board have given directions in regard to specific credits, which are thereby taken out of the general possession of the cashier, and without their authority such credits are disposed of by the cashier with fraudulent intent, he commits the offense denounced by the second classification of the statute. Where his intent is lawful, the cashier needs no authority from the directors to protect him in a transfer of the bills receivable of the association, because he is their general custodian. He is the executive officer. But where his intent is unlawful, his assignment of such bills receivable for his own purposes cannot be distinguished from an offense, be the assent of the directors ever so clearly obtained. Where he is not the general custodian of the bills receivable, because the directors have made some specific disposition of them, he dare not interfere with them without the assent of the board; he cannot be protected in his official position as cashier.

I have ventured to insist upon this construction of the statute in the case of a cashier, because I deemed his case to afford the best possible argument against my construction, if there be any argument possible at all.

It does seem to me that, when the allegations against the defendant are considered—that of wilful misapplication of that which he either deforced from the association by trespass, or feloniously possessed himself of by larceny—the indictment cannot be sustained without imputing to Congress the very widest departure from all principles of

reasonable understanding and common sense. One thing is certain: Section 5209 contains two provisions applicable to the officers designated by the statute. Both of these provisions must be made operative, if it can be done. But the construction insisted upon by the prosecution renders the second provision wholly superfluous and unnecessary. If embezzlement was intended to cover all improper uses of moneys, funds, or credits, without reference to any relation of confidence or possession in trust, then nothing further was needed. The same result follows in regard to abstraction and misapplication. Embezzlement cannot be changed by authority granted to commit the crime. Make it the duty, however, of an officer to use a particular fund in a certain way, after it has been intrusted to him, and he cannot lawfully divert the fund from the purpose of the trust without authority from those who reposed in him their confidence. Without authority he misapplies the fund when he diverts it from its intended use; but with authority, he commits no breach of confidence or trust whatever. Every precedent obtainable is adverse to the validity of these counts. No one ever heard that it could be necessary or material to aver, in an indictment for robbery, *that after he had committed the offense* the defendant used the property he had taken for his own purposes. Larceny cannot be aggravated by retention of the property. It cannot be atoned for by its restitution.

But here, under the naked averment that he was president, the defendant is charged with wilful misapplication of moneys of the association, because *after he had unlawfully taken them*, he converted them to his own use.

I submit that to sustain such a charge under section 5209, will be to say that words have not been used by Congress in their ordinary acceptation; that it was intended to subvert settled principles of law, and that the law-makers have absurdly put upon the statute-book terms and provisions whose significance they utterly failed to comprehend.

III.

Counts from 57 to 76, inclusive, are similar to those last considered, except that they omit to charge that the misapplication was done with the fraudulent intent required by statute.

They are all insufficient, for reasons already urged, and for the further reason that they contain no averment as to the intent with which the act was done.

United States *vs.* Conant, *supra.*

IV.

Counts 77 to 96, inclusive, are alike in character, and contain, in addition to the averments of the counts from 37 to 56, the averment, "*and which said shares of stock, so purchased as aforesaid, were then and there held by him, the said James H. Britton, in trust for the use of said association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debt theretofore contracted with said association in good faith.*"

The charge laid in these counts is, therefore, that for the banking association, the defendant, as its president, bought certain shares of its own stock when such purchase was not required to prevent loss on an existing debt. How can this be an offense? The act is called a wilful misapplication of the moneys of the association, with intent to injure the association, But, even in the designation of the offense, the indictment proves its own repugnancy.

First. The stock was purchased for the association. Capital stock is certainly a liability of the association. Just how the retirement of its liabilities could injure the association, the indictment fails to disclose. If A. owes C. $100, and B., with A.'s moneys, pays the debt, either at its face or at less than its face, in what respect A. has been injured thereby the grand jury who found this bill might be able to discover, but no one else could do so. Where A. assented to the entire proceedings, B. might not be unreasonable in expressing surprise at any complaint found! If the defendant, acting for the association, bought forty shares of stock, at the par value of $100, at the rate of sixty per centum only of such par value, the transaction on its face would hardly suggest a

very deeply seated intent to injure or defraud the association. If the association directed and authorized its president to do this very thing, there could hardly be said to be a very obvious connection between the act done and a crime punishable by imprisonment for not less than five years. *Nil admirari* is a maxim honored in years and ripe with wisdom, but the class of counts now before the court certainly afford a strong temptation to ignore the maxim and at least express surprise!

Not only does the indictment fail to show how the association could be injured; not only does it show that from the very nature of things the association could not be injured, but it does not contain an allegation, from beginning to end, that the defendant used one cent of the money for purposes of his own. He acted for the association. He so acted with authority; for there is no allegation that he had no authority. He served the purposes of the association. He used its own moneys in its own behalf. He applied sixty per cent. of its own moneys to the liquidation of one hundred per centum of its own indebtedness. And in this manner, and in no other, he wilfully misapplied the moneys of the association.

Secondly. The prohibition against the purchase of stock, which is found in section 5201, does not make its violation a criminal offense.

The statute provides that no association shall be the purchaser or holder of any of the shares of its own capital stock, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. The counts allege that, acting for the association, the defendant bought, with the moneys of the association, shares of its own stock, when such purchase was not necessary to prevent loss upon a previously contracted debt.

These counts are evidently drawn upon the theory that where a national bank determines upon a purchase of its own stock, and the act is not necessary to prevent

loss on an existing debt in favor of the bank, then the officers who carry out and effect the purchase wilfully misapply the money of the bank. The president, who negotiates the purchase, misapplies the moneys used. The cashier, who permits the moneys to be paid out, wilfully misapplies such moneys. The teller, who pays out the moneys, is guilty of wilful misapplication. This may be the meaning of the statute, but it will be a new revelation to the framers of that statute.

Section 5137 indicates the purposes for which a national-banking association may purchase real estate. Suppose the directors order the president to buy for the association real estate which is not necessary for the immediate accommodation of the association in the transaction of its business. The purchase is prohibited by the statute. If the president does buy, and in the purchase uses the moneys of the association, he wilfully misapplies such moneys!

Section 5201 provides that no association shall make any loan or discount on the security of the shares of its own capital stock, unless such security shall be necessary to prevent loss on a previously contracted debt. Hence, if the directors determine to lend moneys of the association upon such security, when such course is not necessary to prevent loss, and direct the teller to pay out the moneys to the borrower—if the teller obeys, he thereby wilfully misapplies such moneys!

Section 5200 provides that the total liabilities to the association of any person shall not exceed one-tenth part of the amount of the capital stock actually paid in. Hence, if the directors authorize loans to an individual in excess of this limit, and the cashier pays out moneys in making the prohibited loans, he thereby wilfully misapplies such moneys!

Every national-bank president, therefore, enters upon the discharge of his duties with the very best chance of going to the penitentiary for infractions of law which are

not penal, and which he commits, as he supposes, for the benefit of the association. But it may not be improper to mark a departure on the part of this court from the conclusions of the grand jurors who found this bill. A cause of action can not arise as between the participants in a criminal offense. Good faith on the part of one who, by a given act, commits an intentional crime can hardly be imputed from the offense itself. The two things are not plainly consistent. But this court has enforced, in favor of the criminal, contracts which have arisen out of so-called criminal conduct of the officers and directors of national banks in lending the moneys of the banks in excess of the limitations of the law, and upon cotemporaneous mortgages of real estate! And with reference to the nefarious transaction — the crime on the part of the association, and, *a fortiori*, such on the part of its officers —the court says in one case: "The bank parted with its money in good faith. *Its garments are unspotted!*"

National Bank *vs.* Mathews, 98 U. S. 621.

In another case it is said: "We do not think that public policy requires, or that Congress intended, that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him."

Gold Mining Co. *vs.* Nat. Bank, 96 U. S. 640, 642.

This conclusion, arrived at by this court, is very remarkable if the statute has the meaning upon which the prosecution insists.

Again, the purchase may have been made in reduction of stock. Section 5143 provides that a bank association may reduce its capital stock. The counts do not take this case out of the operation of this section. They do not allege that the stockholders had not voted the reduction; or that the amount of the reduction proposed

had not been reported to the comptroller, and by him approved; or that, after the reduction had been voted and approved, the directors did not effect the reduction by the purchase of shares with the moneys of the association. The entire transaction which constitutes the foundation of these counts may have been entirely lawful, and done with the approval of the comptroller. And the counts ought to have shown that the purchase was not made to secure a reduction of the capital stock of the banking association.

It can hardly be necessary to urge these objections at greater length. I leave these counts with the reflection that perhaps, after all, the grand jury gave them to posterity, not as a "pattern to imitate, but as an example to deter."

V.

Counts 97 to 116, inclusive, are alike in allegation. They relate to purchases of stock.

These counts are all insufficient, for reasons urged against the lot of counts last considered, and for the further reason that they fail to allege that the act complained of was done with fraudulent intent.

VI.

Counts numbered 117 and 118 are similar to counts already commented on in the earlier part of this brief.

I have nothing further to suggest in regard to these counts than has already been indicated.

VII.

The last count in indictment 1530 is numbered 116. It differs altogether from all of the other counts.

The allegation is that the defendant, being president, paid out of the moneys of the association $20,800 in the purchase from himself, for the use of said association, of certain shares of stock in other banking corporations; that these shares of stock were worth $2,820 less than the sum paid for them, as the defendant knew; and that thereby he wilfully misapplied such difference, with intent to injure and defraud the association.

I submit that this count illustrates with great clearness the near relation between the sublime and the ridiculous. I have yet to learn that a national-bank president can not lawfully sell to his own bank shares of stock in some other organization, if his bank sees fit to buy such stock. I have yet to learn that in such sale the doctrine, *caveat emptor*, does not apply. If the stock is not worth as much as its face value, it is the duty of the buyer to inquire as to its real value. The seller is not bound to disclose the real value. Here the president knew the value of the stock which he sold. He made no concealment. He made no false representation. It is not alleged that the bank did not know what the stock was really worth. At all events it was the duty of the buyer to inquire. If the defendant had sold real estate to his bank to be used for the immediate purpose of its business, and by such sale had transferred realty whose value was less than the price paid, he would have been guilty of a wilful misapplication of a sum of money equal to the difference between the price paid and the actual value of the land; and this, too, where the buyer knew the actual value at the time it was bought!

Doubtless, Congress might have provided against such a transaction, and denounced it as a crime; but, doubtless, Congress never did. And I do not hesitate to say that this very count illustrates with the utmost force the absurd results which must follow upon the unwarranted construction of the statute insisted upon by the prosecution, under this and other counts relating to alleged wilful misapplication of funds.

The indictment in record 407 contains only three counts. They all relate to alleged wilful misapplication of moneys.

Concerning these counts I respectfully submit.

1. The first count alleges that defendant was president and director of the association; that he *caused and procured to be received and discounted by the association* his own note in the sum of $20,835, dated March 24, 1877, and payable to the order of George F. Britton, four months from date; that the note was endorsed by George F. Britton; that the defendant received the proceeds of the discount; that the note was not well secured; that both maker and indorser were insolvent when the note was discounted, as the defendant knew; and that by receiving the proceeds of the discount of the note and converting the same to his own use, the defendant wilfully misapplied so much of the moneys of the association, with intent to injure and defraud the association.

In regard to this count, I respectfully submit that a high order of imagination is required to fashion a crime out of the facts alleged. That the note was not *well secured*, and that maker and indorser were insolvent at the time of the discount, are made the grounds of the charge of criminality on the part of the defendant. Prudent banking always requires sufficient security for loans of the bank's moneys; but for a director to borrow from the bank on his own paper, insufficiently secured, is not an offense under section 5209, or under any other section

of the statute. The count concedes that the note was actually secured. It is said to have been not *well* secured. But this, at best, is a mere conclusion, and not a proper averment showing a want of security for the note. It is not an offense for a bank-director to borrow money from the bank when he knows himself to be insolvent. The very loan thus obtained might relieve him from his embarrassment, and lead him out of insolvency into complete financial soundness. I respectfully insist that the count is repugnant and insufficient.

The insolvency of both maker and endorser is a wholly immaterial allegation. The note was given at four months. That the maker and endorser were insolvent at the time of the discount does not amount to an allegation that they were insolvent when the note matured. *But the absurdity of the whole count is found in the failure to allege that the note was never paid!* It must be conclusively presumed, under this count, that the defendant or his indorser performed their respective contracts, and that the note was paid to the association. The defendant promised to pay the sum evidenced by the note. He performed such contract. He did pay the note. The money borrowed was all returned. But in borrowing the money the defendant committed a crime, because he was insolvent at the time when he obtained the discount and loan! His payment of the note proves conclusively that he intended to pay, when he obtained the loan. *Furthermore, the association made the discount.* The defendant received the proceeds with the full assent of the association. There is no allegation that the other directors did not know the financial standing of both the maker and the indorser. The allegation that the misapplication was made with fraudulent intent adds nothing to the count.

Where a count fails utterly to show that an injury was effected, an allegation that the act was done with intent to injure or defraud is wholly without force or sig-

nificance. The discount is not even alleged to have been obtained with intent to defraud. The argument made by the count is that, by means of the discount, the defendant misapplied moneys of the association, and that he so misapplied them, with fraudulent intent. But there is no substantive averment that the intent was fraudulent in obtaining the discount. The answer to the argumentative averments of the count is, that the note was paid at maturity.

Moreover, how can the fact be ignored that a contract between the association and the defendant arose out of the transaction. In consideration of a loan to him, the defendant promised to repay such loan in four months. He knew he was insolvent. So did the other directors. But his note was valid, although his financial condition was well known. The facts alleged are not that the defendant *stole* the moneys of the association, and, having done so, gave his note in recognition of his liability; but they are that, in the first instance, the defendant *borrowed* the moneys, and gave his note as evidence of the loan. Add to these facts the further fact that, in performance of his contract, the defendant paid his note, and the transaction may be called a crime from January to December, without establishing anything more than that the accusers utterly misconceived the meaning and purpose of the statute.

2. The second count is similar to the first, but differs from it in that it is alleged that George F. Britton was indebted to the association in the sum of $79,408.23, evidenced by certain notes; that he was insolvent; that this fact was known to the defendant; that while George F. Britton was indebted as aforesaid, and insolvent, the defendant, as president and director, received and discounted a note made by George F. Britton, in the sum of $800, at sixty days; and that as the proceeds of such discount, the defendant paid out of the moneys of the association, to said George F., the sum of $788.45, and

thereby wilfully misapplied said sum, with intent to injure and defraud the association.

In regard to this count, I have only to say that there is no allegation that the note discounted was not fully secured; that the defendant did not have full authority from the board of directors in making the discount; that both maker and indorser were insolvent when the note matured, or that the note was not paid upon maturity.

The defendant did not receive or retain one cent of the money—the proceeds of the discount. It seems utterly absurd to contend that the indictment as to this count states any offense whatever, and it can only be a waste of time to demonstrate the many particulars in which the count is faulty, insufficient, and marvellously bad.

3. The third count alleges that one A. M. Britton was indebted to the association in the sum of $37,122, as maker of a promissory note owned by the association, the note bearing date January 1, 1873, and being payable on demand; that A. M. Britton was insolvent, and the note not *well secured;* that at this period of A. M. Britton's financial debility, "*there was in the moneys and funds of said association to the credit of said A. M. Britton a large sum of money*,"—$36,860.45; that the defendant, as director and president, knew that A. M. was so indebted to the association; that he knew that A. M. was also insolvent; that he knew that the sum named was in the moneys of the association to A. M.'s credit; that thereupon the defendant *wilfully failed and neglected to apply, and cause to be applied, to the said indebtedness of said A. M. the said sum, and did knowingly permit him, the said A. M., while so indebted, to transfer and assign the said sum of $36,860.45 to the credit of the City National Bank of Fort Worth, Texas;* and that thereby the defendant wilfully misapplied the said sum, with intent to injure and defraud the association.

I can regard this count as nothing but a broad travesty upon the law of criminal jurisprudence. To say that the statute in relation to national banks can be so construed as to give it the meaning necessary to sustain this count, and, in truth, the whole indictment, is to impute folly to the national legislature and cast a reflction upon the intelligence of the court. The count is in keeping, however, with the attempt, which characterizes all of these indictments, to force a construction of the statute which can not be reconciled with any reasonable intent on the part of the legislature, or supported by any respectable authority.

Chester H. Krum

~~CHESTER H. KRUM~~,
Of Counsel for Defendant.

17-655

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IN THE

SUPREME COURT OF THE UNITED STATES.

(CASE NO. 406.)

THE UNITED STATES
vs.
JAMES H. BRITTON.
} OCTOBER TERM 1882.

STATEMENT AND BRIEF FOR DEFENDANT.

IN THE

SUPREME COURT OF THE UNITED STATES.

(NO. 406.)

THE UNITED STATES
vs.
JAMES H. BRITTON.
} OCTOBER TERM 1882.

INDICTMENT NO. 1476.

STATEMENT OF THE CASE FOR DEFENDANT.

On the 20th day of January, 1879, the United States Grand Jury for the Eastern District of Missouri, returned into the U. S. District Court, for the said District, an indictment against the defendant, containing 119 counts for various alleged violations of the National Bank Act. The defendant on the same day appeared, plead not guilty, and entered into recognizance for his appearance at next term of the court—afterwards, at the next term, defendant withdrew his plea of not guilty and demurred to the indictment, whereupon a motion of the District Attorney, the case was remitted to the United States Circuit Court for said District, where the demurrer was fully argued before Judge McCrary, of the Circuit Court, and Judge Caldwell, U. S. District Judge for Arkansas, who sat with Judge McCrary, in place of Judge Treat. The Judges did not agree that any one of the 119 counts was good, and certified a division of opinion to this Honorable Court thereon, which we will refer to later.

The counts in the indictment, though numerous in number, and of a drag-net character, embracing the details of the acts of the defendant, as president of the bank,

during a long period, may be classified, and the consideration of one of each class will be sufficient.

The first count is as follows:

"UNITED STATES OF AMERICA,
EASTERN DISTRICT OF MISSOURI, } ss.

In the District Court of the United States in and — said District, at the November term thereof, A. D. 1878.

The grand jurors of the United States, duly empaneled, sworn, and charged to enquire in and for the Eastern District of Missouri, on their oaths present that James H. Britton, late of said district, on the thirtieth day of June, in the year of our Lord one thousand eight hundred and seventy-six, at said district, being then and there president of a certain national banking association, then and there known and designated as the "National Bank of the State of Missouri, in St. Louis," which said association had been theretofore created and organized under and by virtue of an act of Congress, entitled "an act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said Association was then and there acting and carrying on a banking business in the city of St. Louis, in said district, under the said act of Congress, and the acts amendatory thereof, did make in a certain book then and there belonging to and in use by the said Association in transacting its said banking business, and then and there designated and known as "profit and loss, number six," a certain entry to the credit of a certain account known as profit and loss, which said entry was then and there in the words and figures following, that is to say: RICHARD L. DICKSON: "182 days int., 8 per cent., 132, 673, 49, to July 1, '76, 5,365.88" and which said entry, so as aforesaid, made in said book, then and there purported to show, and did, in substance and effect, indicate and declare, that the sum of five thousand three hundred and sixty-five dollars and eighty-eight cents was then and there received by said Association, on account of interest then and there due and payable to said Association by one Richard L. Dickson.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there false in this, that the said sum of five thousand three hundred and sixty-five dollars and eighty-eight cents was not then and there received by said Association on account of interest then and there due and payable to said Association from the said Richard L. Dickson, as he, the said James H. Britton, then and there well knew; and that the said entry, so made as aforesaid, was then and there false in this, that

the said sum of five thousand three hundred and sixty-five dollars and eighty-eight cents was not then and there received by said Association upon any account from any source, as he, the said James H. Britton, then and there well knew; and that the said false entry was then and there made as aforesaid, with the intent then and there on the part of him, the said James H. Britton, to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

The second and the succeeding counts of the indictment up to and inclusive of count No. 35, are similar, differing only in the names, figures and dates of the entries, and practically involve the same legal questions. The thirty-sixth count is also similar in effect to the first count, except that instead of charging the entry to be made "with intent to deceive an agent thereafter to be appointed by the Comptroller—the charge is that the said false entry was made, "with intent on the part of defendant, to injure and defraud the said association and certain persons to the jurors unknown," etc,

The thirty-seventh count is as follows:

"37. And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, late of said district, on the second day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, being then and there president of a certain national banking Association, then and there known and designated as the "National Bank of the State of Missouri, in St. Louis," which said Association had been theretofore created and organized under and by virtue of an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said Association was then and there acting and carrying on a banking business in the city of St. Louis, in said district, under the said act of Congress and the acts amendatory thereof, did pay to a certain person to the jurors aforesaid unknown, a large sum of money, to wit, twenty-four hundred dollars, out of the moneys and funds then and then belonging to and the property of said Association, in the purchase by

him, the said James H. Britton, from said unknown person, of a large number, to wit, forty certain shares of the capital stock of said Association, which said shares of stock were then and there represented upon the books of said Association to be the property of one Francis Fisher.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president as aforesaid, did then and there, by means of the payment aforesaid in manner and form aforesaid, wilfully misapply the said sum of twenty-four hundred dollars of the moneys and funds as aforesaid of said Association, with intent then and there on the part of him, the said James H. Britton, to injure and defraud the said Association and certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the United States, in such case made and provided and against their peace and dignity."

And the thirty-eighth and the succeeding counts, up to and including the fifty-sixth count, together with the seventy-fourth count are similar to the thirty-seventh, except in the names of the stockholders, of the stock purchased, and the amounts paid therefor, etc., and involve practically the same questions. The fifty-seventh is identical with the ninety-seventh, evidently being copied twice in the indictment, by mistake.

The fifty-eighth count is barred by the statute of limitations on its face, and is similar, (except as to date and amounts, etc.) to count fifty-nine, which is as follows:

"59. And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, late of said district, on the tenth day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, being then and there president of a certain national banking Asociation, then and there known and designated as the "National Bank of the State of Missouri in St. Louis," which said association had been theretofore created and organized under and by virtue of an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said Association was then and there acting and carrying on a banking business in the city of St. Louis, in said district, under the said act of

Congress, and the acts amendatory thereof, did pay to a certain person, to the jurors aforesaid unknown, a large sum of money, to wit: Six thousand dollars, out of the moneys and funds then and there belonging to and the property of said Association, in the purchase by him, the said James H. Britton from said unknown person, of a large number, to wit: Onehundred certain shares of the capital stock of said association, which said shares of stock were then and there represented upon the books of the association to be the property of one Hugh Campbell.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president as aforesaid, did then and there, by means of the payment aforesaid, in manner and form aforesaid, wilfully misapply the said sum of six thousand dollars of the moneys and funds as aforesaid of said Association, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

The sixtieth and succeeding counts up to and including the seventy-sixth count, (except the seventy-fourth before mentioned,) are similar to the fifty-ninth, save in the dates, names of stockholders and amounts paid, and involve the same questions.

The seventy-seventh count is as follows:

"77. And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, late of said district, on the second day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, being then and there president of a certain national banking association then and there known and designated as the "National Bank of the State of Missouri, in St. Louis,' which said association had been theretofore created and organized under and by virtue of an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of out Lord one thousand eight hundred and sixty-four, and which said Association was then and there acting and carrying on a banking business in the city of St. Louis, in said district, under the said act of Congress and the acts amendatory thereof, did pay to a certain person to the jurors aforesaid unknown, a large sum of money, to wit: Twenty-four hundred dollars, out of

the moneys and funds then and there belonging to and the property of said Association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit: Forty certain shares of the capital stock of said Association, which said shares of stock were then and there represented upon the books of said Association to be the property of one Francis Fisher, and which said shares of stock so purchased as aforesaid were then and there held by him, the said James H. Britton, in trust, for the use of said Association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debt theretofore contracted with said Association in good faith.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president as aforesaid, did then and there, by means of the payment aforesaid, in manner and form aforesaid, wilfully misapplied the said sum of twenty-four hundred dollars of the moneys and funds as aforesaid of said Association, with intent then and there on the part of him, the said James H. Britton, to injure and defraud the said Association and certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

The seventy eighth and succeeding counts up to and inclusive of count No. 96 are similar to No. 77, save in dates, names of stockholders, amounts paid, and involve practically the same questions.

The ninety-seventh count is as follows:

"97. And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, late of said district, on the second day of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, being then and there president of a certain national banking association, then and there known and designated as the "National Bank of the State of Missouri, in St. Louis," which said Association had been theretofore created and organized under and by virtue of an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said Association was then and there acting and carrying on a banking business in the city of St. Louis, in said district, under the said act of

Congress and the acts amendatory thereof, did pay to a certain person, to the jurors aforesaid unknown a large sum of money, to wit: Twenty-four hundred dollars, out of the moneys and funds then and there belonging to and the property of said Association, in the purchase by him, the said James H. Britton, from said unknown person, of a large number, to wit: Forty certain shares of the capital stock of said Association, which said shares of stock were then and there represented upon the books of said Association to be the property of one Francis Fisher, and which said shares of stock so purchased, as aforesaid, were then and there held by him, the said James H. Britton, in trust for the use of said Association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debt theretofore contracted with said Association in good faith.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president as aforesaid, did then and there, by means of the payment aforesaid, in manner and form aforesaid, wilfully misapplied the said sum of twenty-four hundred dollars of the moneys and funds as aforesaid of said Association, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

The ninety-eighth and the succeeding counts, up to and inclusive of the one hundred and sixteenth count, except in names of stockholders from whom the stock was purchased, dates and amounts paid therefor, are similar to the ninety-seventh, and involve the same questions.

The one hundred and seventeenth count is as follows:

"117. And the jurors aforesaid, on their oaths aforesaid, do further present that James H. Britton, late of said district, on the thirtieth day of June, in the year of our Lord one thousand eight hundred and seventy-six, at said district, being then and there president of a certain national banking Association, then and there known and designated as the "National Bank of the State of Missouri, in St. Louis," which said Association had been theretofore created and organized under and by virtue of an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said Association was

then and there acting and carrying on a banking business in the City of St. Louis, in said district, under the said act of Congress and acts amendatory thereof, did make in a certain book then and there, belonging to and in use by the said Association in transacting its said banking business, and then and there known and designated as "Journal E," on page numbered three hundred and thirty-eight of said book, a certain entry in the words and figures following, that is to say: Profit and loss: Ex., 58, 98; dis., 172, 99; com. N. Y., 88; cash, 75,-952.66—76,185.51;" and which entry so as aforesaid made in said book then and there purported to show, and did, in substance and effect, indicate and declare, that the sum of seventy-six thousand one hundred and eighty-five dollars and fifty-one cents was then and there received of said Association on account of profits derived from its said banking business.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there false in this, that of the said sum of seventy-six thousand one hundred and eighty-five dollars and fifty-one cents a large portion, to wit, the sum of seventy thousand dollars, was not then and there received by said Association, as he, the said James H. Britton, then and there well knew; and further, that said entry so made as aforesaid was also then and there false in this, that of the said sum of seventy-six thousand one hundred and eighty-five dollars and fifty-one cents, a large portion, to wit, the sum of seventy thousand dollars, was not then and there received by said Association on account of profits derived from its banking business, as he, the said James H. Britton, then and there well knew; that said false entry was then and there made by him, the said James H. Britton, with intent then and there on the part of him, the said James H. Britton, to injure and defraud the said Association and certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

The one hundred and eighteenth is similar to the one hundred and seventeenth, except that the intent is charged to be "to deceive any agent who might be thereafter appointed by the Comptroller of the Currency of the United States to examine the affairs of said corporation."

The one hundred and nineteenth count is as follows:

"119. And the jurors aforesaid, on their oaths aforesaid, do further present that heretofore, to wit, on the twenty-fifth day

of April, in the year of our Lord one thousand eight hundred and seventy-seven, at said district, said James H. Britton, being then and there president of a certain National Banking Association, then and there known and designated as the "National Bank in the State of Missouri, in St. Louis," theretofore created and organized under and by virtue of an act of Congress, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said Association was then and there acting and carrying on a banking business under and by virtue of said act and acts amendatory thereof, in the city of St. Louis, in said district, did pay out of the moneys then and there belonging to said Association the sum of twenty thousand eight hundred dollars, in the purchase, for the use of said Association, from himself, the said James H. Britton, of certain shares of stock, to wit, eighteen thousand eight hundred dollars for one hundred and eighty-eight shares of the capital stock of the Third National Bank of St. Louis; one thousand dollars for one hundred shares of the capital stock of the Valley National Bank of St. Louis, and one thousand dollars for one hundred shares of the Commercial Bank of St. Louis, which said banks were then and there Associations doing a banking business in the said city of St. Louis, within said district; that the actual value of the said shares of stock was then an amount greatly less than the said amounts then and there so paid therefor, that is to say, the said one hundred and eighty-eight shares of the capital stock of the said Third National Bank of St. Louis, were then and there of the value of fifteen thousand nine hundred and eighty dollars, and no more, as he, the said James H. Britton, president as aforesaid, then and there well knew; the said one hundred shares of the capital stock of said Valley National Bank were then and there of the value of six hundred dollars, and no more, as he, the said James H. Britton, president as aforesaid, then and there well knew, and the said one hundred shares of the capital stock of said Commercial Bank of Saint Louis were then and there of the value of fourteen hundred dollars, and no more, as he, the said James H. Britton, president as aforesaid, then and there well knew; that the difference between the said actual value of said shares of stock so purchased as aforesaid and the amount of said moneys so paid in the purchase of the same as aforesaid was the sum of two thousand eight hundred and twenty dollars.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said James H. Britton, president as aforesaid, did then and there, by means of the purchase of said

shares of stock as aforesaid, wilfully misapply the amount of the said difference, to wit: the sum of two thousand eight hundred and twenty dollars, then and there moneys of said "National Bank of the State of Missouri, in St. Louis," with intent then and there on the part of him, the said James H. Britton, to injure and defraud the said Association last named and certain persons to the jurors aforesaid unknown, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity."

On argument the Circuit Court judges were divided in opinion as to sufficiency of any of these many counts, and made the following

CERTIFICATE OF DIVISION.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF MISSOURI, } *ss.*

In the Circuit Court of the United States in and for said Eastern District of Missouri:

UNITED STATES
vs.
JAMES H. BRITTON. } No. 1530.

This is an indictment under § 5209 of the Revised Statutes of the United States, charging the defendant, as president of a banking Association, with having wilfully misapplied the funds of said association. Said indictment is in words and figures following, to wit: (See page 1.) To which indictment a demurrer was interposed, as follows: (See page 155–6.) And the said demurrer to said indictment coming on to be heard at this term, the following questions arose:

1st. Whether it was necessary in the counts of said indictment charging a fraudulent purchase by the defendant of certain shares of the capital stock of said Association to state for whose use the purchase was made, and whether, where it is charged in the indictment that the purchase of stock was made for the use of the bank, such averment vitiates the indictment.

2nd. Whether it was necessary in the said counts to allege that the purchase of stock was not made in order to prevent loss on some previously contracted debt.

3rd. Whether it was necessary in the said counts to set forth the means by which the defendant, as president of said bank, possessed himself of the monies of the bank, which he employed in purchasing said stock.

4th. Whether it was necessary to charge in the said counts

that the defendant, as president of the bank, was in possession of the funds of the bank, in addition to charging misapplication of said funds.

5th. Whether the counts of said indictment, charging the fraudulent purchase by the defendant, as president of said banking association, of certain shares of stock, "in trust, for the use of said Association, and which said shares of stock were not purchased as aforesaid in order to prevent loss upon any debts theretofore contracted with said Association in good faith," alleged with sufficient certainty an offence under said Section 5209 of the Revised Statutes of the United States.

6th. Whether count No. 116 of the said indictment charges with sufficient certainty an offence under said Section 5209 of the Revised Statutes of the United States.

7th. Whether it is necessary in an indictment under Section 5209 of the Revised Statutes charging willful misapplication of the funds of a banking Association to allege that such misapplication was with intent to defraud.

8th. Whether the purchase of stock in violation of Section 5201 of the Revised Statutes of the United States, if made with intent to defraud, and by one or more of the officers of the bank named in said Section 5209 of the Revised Statutes, is a crime punishable under the latter section.

9th. Whether those counts which cover alleged false entries sufficiently state an offence under Section 5209.

On which questions the judges were divided and opposed in opinion; whereupon, upon motion of the plaintiff, by its attorney, that the said points upon which the disagreement hath happened may during the term be stated under the direction of the judges and certified under the seal of the court to the Supreme Court, to be finally decided:

It is ordered that the foregoing state of the pleadings and questions be certified according to the request of plaintiff by its attorneys, and as required by the law in that case made and provided.

Given under our hands and seals this fourth day of February, A. D. 1880.

GEO. W. McCRARY. [SEAL.]
HENRY C. CALDWELL. [SEAL.]

On this record and the questions arising thereon, this case now comes before this Honorable Court.

ARGUMENT AND BRIEF FOR DEFENDANT.

I.

In considering this indictment it may not be inappropriate to call the attention of this Honorable Court to the general principles of criminal pleading applicable to all the counts therein, as decided by this and other courts.

In the case of the U. S. v. Wiltberger, 5 Wheaton, 76, Chief Justice Marshall says (on page 95):

> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department It is the legislature, not the court which is to define a crime and ordain its punishment. It is said that notwithstanding this rule, the intention of the law-maker must govern in the construction of penal as well as civil statutes. This is true. But this is not a new, independent rule, which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases, which those words in their ordinary acceptation or in that sense in which the legislature has obviously used them would comprehend.
>
> The intention of the legislature is to be collected from the words they employ. * * The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of the statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity or of kindred character with those which are enumerated."

In U. S. v. Morris, 14 Peters, 464, Chief Justice Taney says, (page 475,) in delivering the opinion of the Court:

"In expounding a penal statute the Court will certainly not extend it beyond the plain meaning of its words, for it has been long and well settled that such statutes must be construed strictly. Yet the evident intention of the legislature ought not to be defeated by a forced and over-strict construction." 5 Wheat. 95.

In U. S. v. Clayton, 2 Dillon, 219, Judge Dillon says, (on page 224):

"In the office of interpretation, courts, particularly in statutes that create crimes, must closely regard and even cling to the language which the legislature has selected to express its purpose. And where the words are not technical, or words of art, the presumption is a reasonable and strong one that they were used by the legislature in their ordinary, popular or general signification. * * * The legitimate function of the courts is to interpret the legislative will, not to supplement it or to supply it. The judiciary must limit themselves to expounding the law; they cannot make it. It belongs only to the legislative department to create crimes and ordain punishments. Accordingly, courts, in the construction of statutable offences, have always regarded it as their plain duty cautiously to keep clearly within the expressed will of the legislature, lest otherwise they should hold an act or an omission to be a crime, and punish it, when in fact the legislature had never so intended. * * * The doctrine is fundamental in English and American law that there can be no constructive offences; that before a man can be punished, his case must be plainly and unmistakably within the statute, and if there be any fair doubt whether the statute embraces it, that doubt is to be resolved in favor of the accused."

"The indictment should allege all the material facts necessary to be proved to secure a conviction.

State v. Philbrick, 31 Maine, 401.
People v. Gates, 14 Wend. 311.
Goddy vs. State, 8 Tex. App. 127.'

"Though as a general rule it is sufficient to charge a statutory offense in the words of the statute, yet this rule does not apply where there are in the language of the statute no sufficient words to define any offense.

Harrington vs. State, 54 Miss. 490.
Jene vs. State, 26 Miss. 100.
State vs. Charlton, 11 West Va. 332."

"An indictment based on a penal statute must allege every fact which is a constituent of the offense so as to bring the account perfectly within the statute.

Goddy vs. State, 8 Tex. App. 127.
People vs. Poggi, 19 Cal. 600."
U. S. vs. Cruikshank, 92 U. S., 512.

In United States v. Cook, 17 Wallace, page 168, the Court says:

"Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offence, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offence is composed. With rare exceptions offences consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error."

In Com. v. Clark, 2 Ashm. (Pa.) 105–113 it was held:

"In an accusation which set forth a charge which is only criminal under certain circumstances defined by law, the omission either to set forth or aver the existence of the circumstances that fix the stamp of crime on the charge is fatal. It is on the charge as verified by the finding of a traverse jury that the sentence of the law is to be pronounced by the judge. If such charge does not necessarily imply criminality in the accused, there is no foundation to authorize such a sentence. Such vagueness and uncertainty vitiates the count. It is a rule that all indictments on penal statutes must state all the circumstances which constitute the definition of the offence in the act so as to bring the defendant precisely within it. 1 Chitty, Crim. Law, 232."

In U. S. vs. Pond, 2 Curt, Ct. Ct.–265, Judge Curtis says:

"We understand for misdemeanors it is sufficient to lay the charge in the words of the Act of Congress describing the offense, unless it appears those words include cases not intended by the Legislature to be embraced within the law; in that event the indictment must show the case to be one not thus excluded."

Wharton in American Crim. Law, 4th Ed. p. 287, says:

> "It is a general rule that the special matter of the whole fact should be set forth in the indictment, with such certainty, that the offence may judicially appear to the court. * * * * * * * * Where circumstances are constituent parts of the offence, they must be set out, but when the crime exists without them, they may be alleged as aggravation, but are not absolutely requisite. And it is a general rule that, when the act is not, in itself, necessarily unlawful, but becomes so by its peculiar circumstances and relations, all the matters must be set forth in which its illegality consists. The omission of any fact or circumstance necessary to constitute the offence will be fatal."

I.

In applying these well-known principles to the first count of the indictment we think it fatally defective.

a.—The indictment does not contain the averment that the entry complained was made in an account of, and in the due course of business of the bank. The averment that the entry was "made in a certain book then and there belonging to and in use by the said Association in transacting its said Banking business" does not show that the entry was made in any account of, or was in any way connected with, the business of the Bank. It often occurs that various accounts are kept in the same books and the entry might well have been made by the defendant in a book in use by the bank and belonging to the bank, and yet been in an account entirely disconnected with its business. Certainly to a certain intent demands that the indictment should have contained an averment that the account, in which the entry complained of was made, was an account in which the current business of the bank was then and there entered—and which then and there was kept for the purpose of showing the profits and losses of the business of the bank, or equivalent words. Suppose that the production of a book, as described, would show the entry in memorandum form, but in no respect showing the actual transactions of the bank, it would not be contended that it proved any crime against defendant, even if false—yet the averments of the indictment would be proved.

b.—The denomination of the book as "profit and loss No. six" renders this ambiguity more patent, as we have

no intimation of why there were six such books, and it is by no means certain that No. 6 contained the actual current business entries of the Bank any more than Nos. 1, 3 or 5. In fact, the existence of six such books virtually raises a presumption that there was more in them than the current profit and loss account of the Bank. All this uncertainty could have easily been removed by an averment that the account in which the alleged false entry was made was an account showing the current business of the bank.

c.—Another objection is that the entry as recited does not of itself show anything—this the pleader admits by attempting by innuendo to definitely fix its meaning; and he avers that it "purported to show, and did in substance indicate" and declare that the sum of five thousand three hunhundred and sixty-five dollars and eighty-eight cents was then and there received by said Association on account of interest then and there due and payable to said Association by one Richard L. Dickson." This attempt to aid the entry itself by declaring what the pleader thought it meant is not allowable in indictments.

In the case of State vs. Henderson, 1 Rich. (S. C.) 179, it was held:

> "Every indictment must contain and set forth all the ingredients of an offense, and no omission in such statement can be supplied by innuendo. Evidence may sustain and an innuendo may indicate by mere reference what has been before sufficiently set forth. But the one cannot be introduced or the other employed without previous statements, either in a full colloquium or by explicit averment."

Wharton in his 4th ed. American Crim. Law, Section 306, says:

> "Where written instruments enter into the gist of the offence, as in forgery, passing counterfeit money, selling lottery tickets, sending threatening letters, libel, &c., they should be set out in words and figures."

> The use of the word "purport," says Wharton, "it is said means the substance of an instrument as it appears on the face of it to every eye that reads it, and is insufficient where literal exactness is required. But if the instrument does not purport to be what the indictment avers, if its meaning is not accu-

rately stated the variance is fatal. "According to the purport and effect, and in substance" are bad.

Commonwealth vs. Wright, 1 Cush. 46.
State vs. Brownslow, 7 Humphrey, 63.
Dana vs. State, 2 Ohio State R., 91.

"And so is 'substance and effect,'" Commonwealth vs. Sweney, 10 Serg. & R. 173.

"When one material averment in an indictment is contradictory to another, the whole is bad."
American Crim. Law, (Wharton 4th Ed.) Section 396.

d.—When we examine the explanation, the confusion becomes worse confounded, for the entry is alleged to have been made June 30th, 1876, and shows that $5,365.88 was then and there, (to wit: June 30th,) *received* by said Association on account of interest then and there, (to wit: June 30th,) *due and payable* to the Association by Richard L. Dickson. The entry itself says: "182 days int * * to July 1, '76" which means, if it means anything, that the amount was due and payable July 1st, '76, or one day after the innuendo says it was due. So that we must, if we believe the explanation of the entry, find that it was intended to mean that Richard L. Dickson owed the bank $5,365.88, due and payable June 30, and actually paid it on that day, when the entry itself says it was due and payable July 1st It is scarcely conceivable that defendant made the entry for the purpose averred, and it is impossible that the entry "should purport to show or indicate and declare" what is averred in the explanation.

e.—If the entry itself does not show what the pleader says it shows then recourse must be had to the words and figures of the entry; and as said before, of themselves they mean nothing, and the averment that they were made the 30th day of June, shows conclusively that the account and entry were mere memoranda, and not actual entries in a current business account of the Bank. In this view the falsity of the entry is immaterial.

f.—The averment as to the falsity of the entry renders still more uncertain the indictment. The said entry is averred to be false in this, "that the said sum was not *then and there*, (to wit: June 30th,) received by said Association on account of interest then and there, (to wit: June 30th)—due and

payable to said Association" from Dickson, as defendant well knew—and was false also in this, that said sum "was not then and there, (to wit, June 30th,) received by said Association upon any account from any source," as defendant well knew. We have shown that it could not be received on the 30th day of June on account of interest then and there due and payable, because the entry if it shows interest was due and payable at all, says it was not due and payable till July 1st, 1876, and in the ordinary course of business would not be paid till due.

g.—The averment that the amount was *not then and there*, (June 30,) received upon any account from any source" does not aid the indictment, because it might have been received July 1st, 1876, when the entry said it was due and payable on account of interest, or some other account, or it might have been received June 29th. If received at any time when due or before, on account of interest or on another account, the pleader admits by his negotiating the reception thereof, that the falsity in date would not be criminal; but in attempting to be precise by the repeated use of the words *then and there*, he confines his denial of payment to June 30—a date on which by his own admission, the money was not due. Not enough precision where needed, and too much where not needed renders the indictment uncertain, vague and contradictory in its material averment, to wit: the entry itself as charged, and the falsity thereof.

h.—This alleged entry was, then and there made, says the indictment, "with intent then and there on the part of him, the said James H. Britton, to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said Association." The intent is a necessary part of the indictment. The entry may be false in every respect, yet it must be knowingly made and with the intent to deceive. If it is the result of a mistake there is no criminality. If the intent to deceive be absent when the entry is made, no matter what the actual result of the false entry may be. We insist that this averment of intent does not bring defendant within the statute, because 1st. It is impossible to deceive on the 30th day of June an agent to be *thereafter* appointed. The averment is not that the said false entry was then and there made, as aforesaid with intent to deceive any agent who might there-

after be appointed, but it is "that the said false entry was *then and there made*, as aforesaid, with the *intent then and there* on the part of him, the said James H. Britton *to deceive* any agent who might be thereafter appointed," &c. A reasonable construction of this language is that the false entry was made June 30th with intent to deceive June 30th an agent who might be thereafter appointed, &c., which is impossible. "Then and there" in the indictment, used too often, kills it. It is so precise as to be meaningless.

i.—Conceding that this excessive particularity may be regarded as surplusage, and the indictment treated as if the intent to deceive some agent who might *thereafter be appointed* was properly averred. We insist that no such uncertain averment is sufficient. It will be impossible to have an intent to deceive any agent who might "thereafter be appointed," because it was impossible for defendant to know that any agent would ever be appointed to examine the affairs of the Association. It will not do to say that in the course of business he might reasonably expect or fear that one would be appointed, for the expectation or fear might not be realized. The agent might never be appointed to examine this bank, and unless appointed the deception could not occur.

j.—There is no averment that any agent ever was thereafter appointed to examine this bank, consequently there never could be any agent deceived, and if no deception no injury could possibly occur to any one and the criminality would be wanting.

k.—Waiving the uncertainty of future appointment, we insist that the averment as to the appointment is not sufficient, and the phrase "any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said Association, is not only vague as to time but as to manner. What Comptroller of the Currency is meant? The pleader says in the 118th count, the "Comptroller of the Currency of the United States," but the designation in the count under consideration might apply to New York or any other State which had such an officer, and is uncertain. But this defect is perhaps technical.

l.—We insist, however, that if the Comptroller of the Currency of the United States is meant, yet the appointing power is not sufficiently averred.

Section 5240 Revised Statutes United States says:

"The Comptroller of the Currency with the approval of the Secretary of the Treasury, shall as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and in doing so to examine any of the officers or agents thereof on oath, and shall make a full and detailed report of the condition of the association to the Comptroller," etc.

Section 5227 provides:

"On receiving notice that any National Banking Association has failed to redeem any of its circulating notes as specified in the preceding Section the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such Association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in lawful money of the United States when demanded, and shall report to the Comptroller the fact so ascertained," etc.

These are the only sections providing for the appointment of experts or examiners, and to these Section 5209 refers. The Comptroller could not appoint an agent to examine the affairs of the Association, nor could the defendant make an entry with intent to deceive an agent appointed by the Comptroller of the Currency for that purpose. The concurrence and approval of the Secretary of the Treasury is a necessary averment in this count of the indictment, and being entirely wanting the count is fatally defective.

m.—In addition to these objections it may be appropriate to suggest that a "profit and loss account" is not an account of original entries, and is made up from all the various accounts of the bank, and is, generally speaking, in a going concern at least, subject to changes, that is, it never shows the exact condition of the Bank. And no entry in the profit and loss account could in the very nature of things deceive any one as to the condition of the bank, even if the entries were false. Take the entries complained of for example; the interest account would show when the interest was due, and the cash account would show whether it was paid or not. If these accounts were also false then there might be deception on the Bank Examiners, but the indictment should charge the falsity in the original entry, as

the profit and loss account is simply the differences of the general accounts of the bank, It is extremely difficult to realize how a false entry in the profit and loss account could ever mislead any one, or that any sane man would make entries in that account for that purpose.

n.—The indictment is also defective in not alleging that the entry was unlawfully or fraudulently made. And there is no averment that the entry was made with the "intent to injure or defraud the Association or any other company, body politic or corporate, or any individual person" as required by Section 5209 Revised Statutes United States. Unless the entry is made with intent to injure and defraud some one—the intent to deceive the agent may exist and yet no criminality exist. The officer might be led to believe that the Bank was in a much worse condition than it actually was by false entries, and no intent to injure and defraud any one exist, and none possible to accrue by virtue of the false entries, yet the entries might be made with an intent to deceive the officer. The gist of the offense is embezzlement, abstraction or misappropriation of the bank's property, etc., etc., and false entries made to cover the same. The section is homogeneous. Congress intended to denounce as a crime the fraudulent misuse of the bank's funds, and all steps which experience had shown would be likely to be taken to hide the same. The intent to defraud or injure is an essential part of the offense. This question of intent will be more fully discussed in relation to other counts, and we only make reference to it now.

o.—If any one of these objections are good the first thirty-six counts of the indictment are disposed of. The 11th, 12th, 34th, 35th and 36th counts recite entries which consist of disconnected figures and words, which on their face mean nothing whatever, and no declaration of the pleader can add to their meaning. There is nothing even to suggest what these figures mean in the entries as copied in the indictments. All of the first thirty-six counts are amenable to the objections as above stated. Those entries which purport to be made December 30th, 1877, for interest due January 1st, 1877, present the inconsistency of the indictments in strong light. The thirty-sixth count charges the intent to injure and defraud the Association, but in all other respects it comes within the objections stated.

II.

a.—The next question we shall discuss is one which applies to all of the counts in the indictment from the 37th to the 116th, both inclusive. The averment in each of these counts is that the defendant at different dates, "being then and there president," etc., etc., "did pay to a certain person to the jurors aforesaid unknown a large sum of money, to wit: —— dollars, out of the moneys and funds then and there belonging to, and property of said Association in the purchase by him, the said respondent, from said unknown person of a large number, to wit: —— certain shares of the capital stock of said Association, which said shares of stock were then and there represented on the books of said Association to be the property of ——, etc., etc." And that defendant, "*president as aforesaid*, did, then and there *by means of the payment aforesaid and in manner and form aforesaid wilfully misapply the said sum of —— dollars of said Association.*"

Some of the counts charge the misapplication to have been done "with intent to injure and defraud the Association," and some omit that averment. Some aver that the shares of stock purchased were "held by defendant in trust for the use of said Association, and were not purchased in order to prevent loss upon any debt theretofore contracted with said Association in good faith," but as these points will be discussed under another head it is unnecessary to further refer to them.

The questions involved in all of these counts, necessitates a construction of Section 5209 of the Revised Statutes of the United States, which reads, as applicable to the point now under consideration as follows: "Every president, etc., * * * * of any Association who *embezzles, abstracts or wilfully misapplies* any of the money and funds of the Association, etc., * * * * with intent, etc., * * * * to injure or defraud the Association or any other Company, body incorporate or any individual person, etc., * * * * shall be deemed guilty of misdemeanor, and shall be imprisoned not less than five years nor no more than ten." The clauses omitted provide for other offences (such as making false entries, etc., which are not involved at present.) If our construction of this section is proper, all of the counts from 37 to 116 inclusive are bad.

b.—The crime of embezzlement is a statutory offense, said by Mr. Wharton in his late work on criminal law to have been enacted to cure two defects in the common law crime of larceny. He says (2 Wharton's Criminal law, § 1905) "The first of these gaps is caused by the position that to maintain larceny it is necessary that the stolen goods should have been at some time *in the prosecutor's possession*. The second results from the assumption that when possession of goods is acquired *bona fide* by a bailee no subsequent fraudulent conversion (unless there be breaking of bulk or some other rupture of the conditions of bailment) can be larceny while the bailment lasts. * * * * The embezzlement statutes were passed wholly and exclusively to provide for cases which larceny at common law did not include. Hence, nothing that is larceny at common law, is larceny under the embezzlement statutes; and nothing that is larceny under the embezzlement statutes, is larceny at common law.' It is important to keep this in mind as from missing this point some confusion in construing the embezzlement statutes has been produced."

Again, § 1919, the same author says: "It is necessary to the constitution of the offence, that the defendant should have *received the money by virtue of his employment*. Again Section 1924 he says: "Hence that which is larceny at common law from the fact that the goods were taken from the owner's possession, is not embezzlement." Again in Section 1940 he says: "The distinguishing features, to wit, *the defendant's fiduciary character*, which divide embezzlement from larceny *must be especially averred*."

Speaking of embezzlement by trustees and bailees, he says Section 1959: "The indictment must aver not simply the bailment or trust, but the special circumstances which made the case embezzlement under the statute, and so it is necessary to state in the indictment *the purpose for which the defendant was intrusted with the property*, and the specific act of fraud with which the defendant is charged.

The only averment in all of these counts, is that the defendant, *as president*, paid out of the moneys of the bank for certain shares of stock, and if the offence was charged as embezzlement there could be no question, but that all of the counts would be bad.

c.—We insist that the words "*embezzle, abstract or wilfully misapply,*" are used to describe different grades and classes of embezzlement. We do not intend to reiterate the arguments and authorities of Messrs. Glover, Shepley and Judge Krum on other indictments now being heard in connection with this one by this Court, for we deem them conclusive; but wish merely to reinforce their position as applicable to the indictment and counts now under consideration.

Bouvier in his Law Dictionary defines *embezzlement* to be "the fraudulently removing and secreting of personal property *with which the party has been entrusted* for the purpose of *applying it to h—own use.*"

Webster (Dictionary) says: "Embezzling" means "fraudulently *applying* to one's own use what is *entrusted to one's care and employment.*"

Webster defines "Abstract" "to take for one's own use from the property of another *when placed in one's power.*"

"Apply" is defined by Webster, "to use or employ for a particular purpose, as to apply a sum of money to the payment of a debt."

"Misapply" is defined "to apply to a wrong person or purpose—as to misapply public money."

All of these words imply the idea of possession of the property misapplied, etc. A man can no more abstract money, or misapply it, than he can embezzle it, without having possession. The central idea of "misapply" is the power to "apply" misused. And Congress in using the words "embezzle, abstract and misapply" intended to cover all breaches of trust and confidence which might be conferred on the officers and employees of the bank.

d. Not only are the words used interchangeably by Congress, and by Parliament, and State legislatures, as shown in the briefs in these cases, but the courts frequently so use them.

In the case of the U. S. vs. Hall, 8 Otto, 343, the Court had under consideration Section 4783, R. S., which provides that a guardian, having charge and custody of the pension of his ward, who embezzles the same in violation of his trust, or fraudulently converts the same to his own use shall be punished by fine, etc. The Court says, on page 348:

"He (the guardian) cannot, within the meaning of the Act of Congress, embezzle the pension money of his ward, or fraudulently convert the same to his own use in violation of his trust before the same is paid to him as such guardian;' again, "that the offence * * consists of embezzling the pension of the ward by the guardian, or of fraudulently converting the same to his own use after the same is paid to him by the Government."

On page 349, in speaking of this offence, the Court makes use of this language:

"Power to protect the fund from *misappropriation*, fraud and unauthorized conversion to the use of another, and secure its safe and unimpaired transmission to the beneficiary has been claimed and exercised through the whole period since Congress, under the Constitution, commenced to grant such bounties."

It will be seen from this language that the Court uses the words, "misappropriation" and "fraud" and "unauthorized conversion" as synonomous with "embezzle," "convert" and "fraudulently convert to his own use in violation of his trust;" and we apprehend that the language of Judge Clifford, in speaking for the whole Court, was advisedly used.

The case of Bachelor vs. Cilly, 27 Vermont, 578, was a proceeding against a person for embezzling and alienating property belonging to the estate of a deceased person under the statute reading as follows:

"Any person after the grant of letters testamentary or of administration on the estate of a deceased person, who shall embezzle or alienate any of the goods, chattels or effects of such deceased person shall be liable, &c., to double the value of the property so embezzled or alienated." The facts in the case were that the property belonged to the estate of the deceased and the defendant as joint tenants, the result of their farming on shares. The Court, in reviewing the case, says there was no embezzlement, using the following language: "We think that to bring the case within this section of the statute, the act complained of must be done, at least, with an intent of *wrongfully abstracting* property from the estate of the deceased to the injury of its assets."

The language used in this statute is "embezzle or alienate." The Court says they are equivalent to "wrongfully abstracting the property, etc., to the injury of its assets."

Thus we find that the words "embezzle," "misappropriation" and "abstract" — the words used in Section 5204 — have been held to mean one and the same thing, and that the offence denounced in that Section is against embezzling, abstracting or misapplying by an officer or agent of a National Bank, of funds which came to him by virtue of his trust position, with an intent to defraud the Association or some of the parties named in the Section. The three words are descriptive and apply to the same general offence.

In the case of Van Campen—Thompson's Nat. Bank Cases, p. 185, (2 Benedict, 419,) Judge Blatchford, in speaking of this Section, says:

"* * * * Where a president of a bank, charged, *as a trustee*, with the administration of the funds of the bank *in his hands*, converts them to his own use, he *embezzles and abstracts* them, within the statute referred to, unless he shows authority for so doing."

Thus using the words "embezzles" and "abstracts" as synonymous, and if the learned judge had said "embezzles, abstracts and misapplies them," the sentence would have been correct and had the same meaning.

In the case, Commonwealth v. Felton, "Thomp. Nat. Bank Cases," p. 573, (101 Mass., 204,) Judge Ames says, on page 574:

"But the Act of Congress (U. S. Stat. 1864, ch. 106) from which the National banks derive their existence and organization, contains a section (§ 39) which also makes full and ample provision for the punishment of the *crime of embezzlement and fraudulent appropriation of any funds of a National bank by any cashier, etc., of such bank.*"

In the case of Minor vs. The Merchants' Bank of Alexandria, 1 Peters, 46, J. Story says, p. 68:

"The first instruction is, in substance, that if Minor, upon his leaving the bank, failed to pay over or account to the bank for any portion of the moneys of the bank *received by him as cashier*, then the jury may and ought to infer that the moneys so unaccounted for were wilfully wasted by Minor, or *applied to his own use;* and under such circumstances, the defendants are liable for the same. We can perceive no error in this instruction; the presumption of a wilful waste or *misapplication of the funds of the bank by the cashier*, was a natural conclusion from his failure to pay over or account for the same."

In the case of Conant, cited herein, the indictment alleged:

"That Conant as cashier had received into his possession certain of the moneys, funds and credits of said association, to wit.: certain United States Treasury notes of great value, to wit: of the value of five hundred dollars, etc., etc., and said treasury notes, etc., being the property of said Banking association of great value aforesaid, and then and there *being in the possession of Conant as such cashier and agent* aforesaid be the said etc., and then and there etc., etc., unlawfully, with intent to defraud said Banking Association, *embezzle, abstract and wilfully misapply* and convert to his (C.'s) own use, etc."

This form of indictment is endorsed and given by Mr. Wharton in the last edition of his "Precedents of Indictments," as the proper form of indictment under Section 5209, Rev. Stat. U. S.

Wharton's Prec. Ind., (4th Ed.) p. 465, a.

In Taintor's case (11 Blatch. 374,) also, the indictmen was against a cashier of a National Bank for *embezzling, abstracting and wilfully misapplying* the moneys and funds of the bank with intent to injure and defraud the association.

Thus we see that Courts, eminent law writers, and experienced prosecutors, use the words "embezzle, abstract and misapply" as designating a crime involving the violation of a breach of the trust, whereby the funds came into the offender's possession, and the conclusion is irresistible that Congress used them in this sense in Section 5209.

e.—If we consider the class of persons included on the section we find they are the officers and employees of the bank —those who are likely to be entrusted with its funds, and those who alone could be guilty of a violation of the confidence necessarily reposed in them in that regard, hence the reason of the law accords with the construction we contend for.

f.—If the relation of trust and confidence is not an element of the crime denounced by Section 5209, this enactment was unnecessary, for any one of the persons named in the section could have been convicted of larceny at common law, or by the State statute, without congressional enactment. If the "abstraction" and "misapplication" of the funds of the bank are simply statutory larcenies, then the enact-

ment was entirely unnecessary, as any officer could be convicted at common law for larceny, if the element of the "violation of the trust relation" did not enter into the offence. These positions are ably maintained in the case of Commonwealth v. Barry, "Thomp. Nat. Bank Cases," p. 605, (116 Massachusetts, 1). Wells, J., says, p. 608–9:

"The offence charged in the indictment upon which the defendant was found guilty, is that of receiving and aiding in the concealment of stolen property, under the General Statutes, chapter 161, section 43. The count recites the previous larceny of the property, consisting of money, from the National Mechanics' Bank, by William S. Hine. Both this and the principal offense of Hine, as set forth, are independent of any trust, and of any relation of either to the bank as officer, clerk or agent. But *such relation and breach of trust are essential elements in the offence*, punishable under the laws of the United States. The U. S. Statutes of 1862, chapter 106, Section 55, provides: 'That every president, director, cashier, teller, clerk, or agent of any asssociation, who shall embezzle, abstract or wilfully misapply any of the moneys, funds or credits of the association' shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than five nor more than ten years." The two offenses are essentially different. The statute of the United States does *not purport to punish larceny as such.* The obvious inference is that Congress did not intend to interfere with the jurisdiction of the State laws and State courts over offenses of that class against the property of National banks.

Upon the facts stated it is clear that the offense of Hine was larceny, not embezzlement. Although as teller he was entrusted with funds of the Bank while engaged in transacting its business, at night they were withdrawn from his possession and placed in such custody that he could not lawfully resume possession until the return of business hours and the *concurrence of the cashier* authorized him to to so. That custody was possession by the Bank, and his wrongful violation of it made the taking of the funds larceny.

Com. vs. Berry, 99 Mass., 428.
Com. vs. Davis, 104 Mass., 548."

In the case of State vs. Fuller, "Thomp. Nat. Bank Cases," 375 (34 Conn., 280) J. Butler, J., says, pp. 377–8, speaking of Congress:

"They did enact in the 55th Section of the Currency Act, that if any teller or other officer of the Bank should embezzle the property of the bank they should be punishable by fine and imprisonment. That provision goes to the being and internal

working of the bank, *and it is intended to protect its property from its agents.* It was not intended to regulate and has not the effect of regulating the business of the bank with its customers. Now the business of the bank is conducted within the jurisdiction of this State, with our citizens, and in conformity to our laws, and it is competent for the Legislature to pass any laws affecting that business, or protect the bank or its customers in the conduct of that business by any penalty, and such law and penalty will not be predicated on any law or offence created by Congress, or have any relation or be repugnant to the Currency Act, or in any manner infringe the jurisdiction of Congress or the Federal courts. It is theft by our law to steal from a National bank; it is burglary to break into one for the purpose of stealing; and it is cheating to obtain money from one by false pretenses. * * * The import of the third and fourth requests, if I correctly understand them, is that there could be no conviction under the first count for larceny, if the prisoner took the package entire and unbroken from the bank; but it is not a case for the application of the principle claimed. It is not alleged, nor was it attempted to be proved, that the prisoner received the package, or that *he was entrusted with it*, or that he ever had care or possession of it. All that it alleged or could be proved is, that he had access to the place of deposit. There being *no trust, or possibility of the breach of trust, no possession nor custody*, the technical rule in relation to the breaking of a package is entirely inapplicable."

In the case of Com. vs. Tenney, "Thomp. Nat. Bank Cases," 568, (97 Mass., 50,) Foster, J. says, p. 569:

"The further objection is made, that the courts of the United States are vested by the Judiciary Act of September 24 1789, (U. S. Stat. 1789, chap, 20, Section 11), with exclusive cognizance of all crimes cognizable under the authority of the United States, except when it is otherwise provided by the Acts of Congress. But an examination of the statutes of the United States leads us to the conclusion that the offence charged in this indictment has not been made punishable by any Act of Congress. The enactments cited on behalf of the defendant punish the *embezzlement of the property of the National banks*, but not of the property of individuals, deposited with and in the custody of such banks. U. S. Stats., 1863, chap. 58, Section 52. U. S. Stats., 1864, chap. 106, Section 55.

And the court held that an officer of a National Bank who took bonds of a depositor deposited with the Bank, and sent them to a broker in another State as collateral

security for money advanced, was rightly convicted of larceny under the Massachusetts Statute.

In the case of Commonwealth v. Fulton, Thomp. Nat. Bank cases, p. 573 (101 Mass. 204), it was held that a State court has no jurisdiction of the crime of embezzlement by an officer of a National Bank situate within this State. Ames, J., saying, page 574:

> "But the Act of Congress (U. S. Stat. 1864, ch. 106,) from which the National Banks derive their existence and organization contains a Section which also makes full and ample provision for the punishment of the crime of embezzlement or fraudulent appropriation of any funds of a National Bank by any cashier etc., of such bank. It exactly covers the crime imputed to Martin. It declares that description of crime to be a misdemeanor and makes it punishable by imprisonment in the State prison. It makes no provisions or reservation for the prosecution and punishment by any State authority, but makes it cognizable under the authority of the United States. By the terms of the Judiciary Act, (U. S. Stat., 1789, ch. 20, Section 11,) the courts of the United States are vested with the exclusive cognizance of all crimes that are punished by the act of Congress, except where the act of Congress makes other provisions, and it would, therefore, seem that the crime of embezzlement by a cashier of a National Bank located within one territory is taken out of the jurisdiction of our courts.'

If these cases are correct in principle there was no necessity for Congress to enact a statute which simply denounced the crime of larceny, as the common law would punish such crimes. But Congress intended to protect the bank from its officers entrusted with its funds, and to supply any omissions in the State statutes of embezzlement that might exist, and to denounce a certain penalty against the officers or employees of the bank who criminally violated their trusts.

IV.

a.—It follows that if the statute in question embraces embezzlements of all kind in the words, "Embezzles, abstracts or wilfully misapplies" all the counts in the indictment alleging "wilful misapplication" of the funds of the bank are bad; because it is a familiar rule of criminal practice that indictments for embezzlement must contain averments showing the trust relation and that the funds misapplied

came into the possession of defendant by reason of such trust relation. As these averments are wanting the counts mentioned are all fatally defective.

In the case of Bartow v. State, 78 N. Y., 377, it was held:

> "In order to sustain an indictment, under the statute relating to embezzlements against the treasurer of a corporation, for the alleged conversion to his own use of money of the corporation, it must be made to appear that the money in question came into his possession or under his care by virtue of his office."

This was held in a case where the prisoner was treasurer of a savings institute, and cashier of a bank; the two corporations doing business in the same room and over the same counter. The money alleged to have been embezzled was delivered to the prisoner in an envelope. He, in accordance with the custom of the bank, deposited the package to the credit of his bank with its correspondent bank in New York. The money so deposited in New York was drawn out by the bank, which subsequently suspended. The money was not entered on the books of either corporation. On this state of facts it was held, that the evidence failed to show as matter of law that the money came to the hands of the prisoner as treasurer of the institute; and that a charge to the effect was error.

In the People vs. Allen, 5 "Denio,', p. 76, it was held:

> "An indictment upon a statute, must state all the facts and circumstances whish constitute the statute offense, so as to bring the accused perfectly within the provisions of the statute. Therefore an indictment for embezzlement under the statute concerning that offense, (2R S. 678, §59), must aver that the defendant was a clerk or servant of some person, (or an officer or agent of a corporation), and that the property he is charged with embezzling *came to his possession or under his care by virtue of such employment.*"

In Griffin vs. State, VI Reporter, p. 380, the Supreme Court of Texas held, that an indictment against an express agent for embezzlement of money committed to his care for transportation, belonging to the Paris Bank, was defective—

> "Because the indictment fails to charge any *fiduciary relation between the owners of the money and the appellants*, and because it fails to charge that *the money belonged to the principal of*

the agent accused, or that the Texas Express Company had any property interest in the money charged to have been embezzled, it is defective and insufficient to support the offiense defined in the statute."

We might easily multiply cases, but we apprehend the rule will not be disputed.

V.

a.—Anticipating that the government's counsel will contend that defendant being charged with willful misapplication of the funds of the Bank, as president, therefore it is a sufficient designation of the trust relation, and that the Court will presume the funds were in his custody as such president. We respectfully submit that such is not the law. We insist that if presumptions could be indulged by the Court against defendant that the legal presumption would be that as president he did not have the custody of the funds of the Bank, but that the same was in the sole possession of the cashier.

In the case of the Merchants' Bank v. State Bank, 10, Wall., Page 649–650 Mr. Justice Swayne says:

"The question we are now considering is the authority of the cashier. It is his duty *to receive all the funds* which come the bank, and to enter them upon its books. The authority to receive implics and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry on the books of the bank. This he is authorized to do *virtute officii.* The power is inherent in the office. The cashier is the executive officer, *through whom the whole financial oeprations of the bank are conducted. He receives and pays out its moneys*, collects and pays its debts, and receives and transfers its commercial securities Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of his various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the right of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown."

In the United States v. The City Bank of Columbus, 21 How., page 364, Mr. Justice Wayne says:

"The court defines the cashier of the bank to be an executive officer, by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. *His ordinary duties are to keep all funds of the bank, its notes, bills, and other choses in action*, to be used from time to time for the ordinary and extraordinary exigencies of the bank. He usually receives directly, or through the subordinate officers of the bank, *all moneys and notes of the bank,* delivers up all discounted notes and other securities when they have been paid, *draws checks to withdraw the funds of the bank* where they have been deposited, and, as the executive officer of the bank, transacts most of its business. The term ordinary business, with direct reference to the duties of cashier of banks, occurs frequently in English cases, and in the reports of the decisions of our State courts, and in no one of them has it been judicially allowed to comprehend a contract made by a cashier, *without an express delegation of power from a board of directors to do so, which involves the payment of money*, unless it be such as has been loaned in the usual and customary way."

First Nat Bank of Lyons v. Ocean National Bank, "Thomp. Nat. Bank Cases," page 728 (60 New York, 278), Allen, J., says. page 735:

"The duties of the cashier are well understood, and as recognized judicially are restricted to the care *and management of the property and fiscal concerns* of the bank, in the conduct of its business as a bank, in the usual and ordinary way. Strory on Agency, §§ 114, 115; Badger v. Bank of Cumberland, 26 Me., 428; Merchants' Bank v. State Bank. 10 Wall. 604; Bank of Genesse v. Patchin Bank, 3 Kern. 309. The president and cashier of a bank cannot assign the choses in action of the corporation to its creditors as a security for the payment of a precedent debt, without authority from the board of directors. They can do no act outside of their ordinary duties in the conduct and management of the banking business, unless by authority, either express or implied, from the fact that they have been permitted to do the like acts without objection. Hoyt. v. Thompson, I Seld. 320.

In Hodnet vs. First Nat. Bank, 22 Grattan, 51, speaking of National Banks, the Court of Appeals of Virginia, says:

"Thus it appears that the general management of the business of the Bank and the interest therein of the stockholders are con-

fined to the care of the Board of Directors, and there is in the act no *specification of the powers or duties to be exercised by the President or cashier.* The election or appointment of such officers by the board is provided by the act which also provides that the board may define their duties. But *there is nothing in the record to show whether such duties have ever been so defined.* We must, therefore, regard the president and cashier of this bank as having only such powers as may be incident to their offices respectively in their very nature in the absence of any thing in the act of incorporation to the contrary; and we must regard all other powers needful to the management of the concerns and business of the bank as residing alone in the directory. * * * *The President of Bank has, it seems, very little inherent power.* He is generally, if not always, a member of the board of directors, and chosen by the board from their own number. It is his duty to preside at meetings of the board. 'Ordinarily,' we are told, the position is one of dignity and of indefinite general responsibility rather than of any great and accurately known power. The president is usually expected to exercise a more constant, immediate and formal supervision over the daily affairs of the bank than is required from any other director. *Usage or directorial votes may confer upon him special functions*, and may extend his authority to correspond with the increase of active duties. *But the authority inherent in the office itself is very small;* indeed, it is very difficult to say precisely how, or where it is much in excess of that which can be exercised by any other single director. Morse on Banking, p. 128."

The court then discusses the power of the president, *virtute officii*, to give up a debt or liability of the bank, and decides he could not do so, citing many cases from the United States Supreme Court and other courts.

In Bissell vs. First Nat. Bank, 69 Pa. St., 416–19, it was said:

"An incorporated bank has a president, cashier and board of directors, and the cashier is the general executive officer to manage its concerns in all things not peculiarly committed to the directors by the charter, and he is the agent of the corporation and not of the directors.'

In Caldwell vs. Mohawk Valley Bank, 64 Barb, 333–40, it was said:

"The cashier *is wholly intrusted with all the funds of the bank* to be used from time to time in the ordinary and extraordinary exigencies of the bank. In that he is considered as the executive officer, through whom and by whom the whole moneyed operations of the bank in paying and receiving debts, or

discharging or transferring securities are to be conducted (Ang. & Ames, Corp., 293)."

Hence we think these authorities show conclusively that the president of a national bank, in the absence of by-laws or special delegation of authority, is not the legal custodian of the funds of the bank, and that the indictment cannot be aided by such presumption.

b.—If it was a fact that defendant was the custodian of the funds of the bank, the court could not judicially know it. The indictment must aver the fact and show that the money came to his hands by virtue of the trust relation.

In the case of State vs. Johnson, 21 Texas, 775, it was held in an embezzlement case that

"It is the breach of trust that constitutes the gist of the offense. Unless a duty or trust has been imposed there can be no breach of trust. It is not every officer of an institution that is incorporated who can be held liable under this statute by converting to his own use the money of the institution, but only such officers, clerks and agents as have the money of their principal or employer [the institution] which shall have come in their possession, or shall be under their care by virtue of said office, agency or clerkship. *The court cannot know judicially what are the duties* of a clerk of such a corporate body. It being alleged that he *received the money as clerk*, it might thence be inferred that it was the duty of the clerk to receive or keep the money of the lodge. That inference, however, could only be indulged on the presumption that being honest he would not have received it unless it was his duty, which presumption of his honesty this indictment seeks to contradict. *Upon this allegation rests the criminality of the matter, and, therefore, it should not appear as a matter of inference, but should be directly alleged*, especially in so important an offense as that which may amount to a felony. * * * * For the reason then that this indictment does not distinctly state that defendant had the possession or care of this money by virtue of his clerkship when he committed it to his own use it cannot be sustained.' See also Griffin vs. State, 4 Texas, App., 390.

In U. S. vs. Forrest, 3 Cranch, Ct. Ct., 56, it was held that

"An indictment under the 16th section of the act of Congress, 3d March, 1825, in relation to embezzlement by officers, clerks of the United States Bank, for embezzlement, must aver that the thing embezzled came to his hands or possession by virtue of his employment. It is not sufficient to state that it *came*

to his hands as bookkeeper, or in virtue of his office as bookkeeper, or while he acted as bookkeeper. It must appear that he had authority from the bank to have it in his custody or possession at the time of the embezzlement. Also held that certainty to and common intent is not sufficient in an indictment. It must be certainty to a certain intent. Nothing material can be taken by intendment." Ibid.

In the case of Com. vs. Wyman, 8th Metc., 247, Wymyn, president and director of Phœnix Bank, and Brown, cashier, were indicted for embezzling certain moneys which by "virtue of their said respective offices and employments," &c., "they did have, receive and take into their possession." The court held, p. 253, "that the term officer as used in the Rev. Stat., a. 126, § 27, included the president and cashier, saying "that presidents and directors being officers of banks, and as such within the mischief intended to be prevented are also within its remedies, and that where they are properly *charged as intrusted with the property of the bank or of its depositors* they may, on proof of their guilt, be punished for embezzlement and not merely for larceny." The court then held that the Rev. Stat. of Massachusetts. a. 133, ch. 10, did not include bank officers, saying, page 260: "The officers of banks, therefore, are to be proceeded against in the same manner as before the revised statutes existed, and it is for the officer of the Government to determine in regard to the character of the indictment, whether the same can be maintained, *and as to the manner in which an agency on the part of the president as to the custody of the funds of the bank can be proved*, if it existed, and whether it can prove a distinct act of embezzlement committed by defendant."

The statute under which the defendants were held, reads: "If any cashier or other officer, agent or servant of any incorporated bank shall embezzle or fraudulently convert to his own use or shall fraudulently take or secrete with intent to convert to his own use any bullion, money, note, bill, obligation or security, or any other effects or property belonging to and in possession of such bank or belonging to any person, and deposited therein, he shall be deemed by so doing to have committed the crime of larceny in said bank," etc., etc.

According to note *b*, American Criminal Law, (Wharton 4 Ed.) Section 1907. When this case went back for trial Mr. Webster contended for defendant

that the case as stated by the District Attorney did not come within the statute. After argument the Court intimated it would be governed by the opinion of the Supreme Court. (8th Metcalfe 247.) Mr. Rogers for the State, then asked the Court "What was to be considered as an "entrusting of the funds, within the language of the Supreme Court. The Court replied as follows: "If the president and directors of an ordinary country bank, at a regular meeting of the board, with a fraudulent intent to get possession of the moneys of the bank, were to discount notes and direct the cashier to pay out the money upon them, knowing them to be worthless, it would be a conspiracy, and not an embezzlement, unless the cashier was privy to the fraud. If the cashier participated in the fraud, it would be embezzlement on his part, and the president and directors would be accessaries. If the defendant, acting as president and director, did the same thing, and no more, and the cashier innocently paid out the money, could it be any more an embezzlement in the defendant than in the president and directors in the case supposed? To test this, if the cashier was party to the fraud, he clearly would be liable for the embezzlement. Why! *Because he was intrusted with the funds.* Could the defendant in that case be otherwise indicted than as an accessary? Clearly not, unless *he and the cashier had joint possession of the funds.* If, then, the cashier was so intrusted with the funds as to render him liable for embezzling them, *can the same funds at one and the same time be regarded, within the meaning of the Supreme Court, as intrusted to the defendant, so as to render him liable for embezzling them by an act in which the cashier did not participate.*" After such a view of the law, the prosecuting officer, stating he could not consistently ask a verdict of guilty, abandoned the case. (8 Boston Law Rep. 341; 8 Metcalfe, 247.)

As none of the counts alleging "wilful misapplication" contain averments that defendant, as president, had the custody of the funds of the bank, or that the alleged misapplied moneys came to his possession by virtue of his official relation to the Bank, they are all bad and the demurrer must be sustained. (Counts numbered 37 to 115, both inclusive, and count number 119 are amenable to these objections and should be quashed.)

VI.

a.—The counts which allege willful misapplication are defective in that they contain no sufficient description of the property misapplied. The words are: "Did pay to a certain person, to the jurors unknown, *a large sum of money, to wit: twenty-four hundred dollar, out of the moneys and funds* then and there belonging to and the property of said Association." According to the indictment the Bank had "moneys and funds." The property alleged to be misapplied was "money," but, whether greenbacks, gold, silver, or national bank, or state bank "money" we know not. Nor is there any averment of value of the "money" thus applied. The description of the property and the value thereof should be alleged, with at least certainty to a common intent, and for this cause alone the counts are bad.

Wharton, Criminal Law Section 363, 1st vol. says, on this subject:

> "Twenty-five dollars in money is not a sufficiently exact description—citing Smith vs. State, 33 Ind., 15, and 11 Humphrey, 39. A count charging the conversion of $19,000 in money and $9,000 in bank notes is bad, for uncertainty—citing State vs. Stinson, 4 Zab. (N. J.,) 9."

Again he says Section 362;

> "It is necessary that some specific value should be assigned to whatever articles are charged as subjects of larceny. An indictment cannot be sustained for stealing a thing of no intrinsic or artificial value. An averment of the value of bank notes is always necessary, but not so of Government coins, which are values in themselves."

Again, speaking of indictments of embezzlement, he says:

> "There can be no larceny of a thing destitute of value, and hence the omission of values, even to bank notes and bills, is fatal." § 1838.

Again:

> "Unless the pleader is relieved from this exactness by special statute, the goods and ownership must be set out in an indictment for embezzlement, with the same completeness as in larceny.' §1941.

In the People vs. Cox, 40 Cal., 276, the court said:

> "An indictment for the crime of embezzlement ought to state the description of the property embezzled with the same particu-

larity as is required in an indictment for larceny. For obvious reasons it may be difficult to give such a description of property embezzled, particularly when the offense is committed by a person in the course of a continuous employment, as a clerk, cashier, or the like; but I find nothing in the law authorizing us to make any distinction upon this point between offenses of larceny and embezzlement. It would promote the ends of justice perhaps, if a statute should be passed to correct the law in this particular, as has been done in England, where it is enacted by stats. 7 and 8, Geo. iv., ch. 29, §48, that 'it shall be sufficient to allege the embezzlement to be money without specifying any particular coin or or valuable security."

Thereupon the case was reversed because the description of the money alleged to have been embezzled was not averred to be lawful money of the United States as particularly described.

See also generally on the subject of description of property and value in indictments for larceny and embezzlement:

People v. Winkler, 9 Cal. 236.
2 Bishop in Crim. Law, § 358.
People v. Cohen, 8 Cal. 42.
Com. v. Stebbins, 8 Gray, 492.
Com. v. McKenney, 9 Gray, 114.
Com. v. O'Connel, 12 Allen, 451.
Com. v. Butterick, 100 Mass. 3.
R. v. McGregor, 3 B. & P. 106.
Bullock v. State, 10 Ga. 47.
2 East P. C. 576.
R. v. Furneoux, R. R. 335.
People v. Griffin, 8 How. Pr. 475.
Com. v. Lovery, 101 Mass. 207.
Com. v, Cahill, 12 Allen, 540.
Merril v. State 45 Miss 651.

b.—The objections as herein urged, to wit, first, that there is no averment of a trust relation between defendant and the bank, which implies the custody of its funds; second, that there is no averment that the funds alleged to have been misapplied were ever in his possession; third, that there is no averment that such funds came into his possession by virtue of the trust relation existing between the defendant and the bank; fourth, that there is no averment sufficiently describing the property alleged to have been misap-

plied; fifth, that there is no averment that the property alleged to have been misapplied, was of any value—apply with equal force to all the counts in the indictments from 35 to 116, both inclusive, and to count No. 119. If any one of the objections is good then all of these counts are bad, and the demurrer must be sustained.

VII.

a.—The next question involved in this record is whether or not those counts omitting the allegation of an *intent to injure and defraud* are sufficient. We insist that Section 5209 specifically requires that the acts denounced in the section must be done with intent to injure and defraud the association or some other company, body politic or corporate or individual person. Without the criminal intent the statutory offences therein enumerated do not exist. It will be observed that the language is, "with intent, in *either case*, to injure and defraud," etc. These words, "in *either case*," according to the known rules of construction must apply to all of the acts specified in the section, and such, we think, is the construction given to these words by all the counts which have construed them. We go a step farther and contend that even if the words "with intent," etc., did not appear in the statute, it would be necessary to allege that the misapplication or false entry were made with intent to injure or defraud, or that they were made corruptly or fraudulently, in order to sustain the indictment.

In the case of United States vs. Fox, 95 U. S., 670, this court held:

> "The criminal intent essential to the commission of a public offence must exist when the act complained of is done, it cannot be imputed to a party from a subsequent independent transaction."

In State vs. Gardner, 5 Nev. 377, the court says:

> "Nothing short of the intent to do a forbidden thing will make a man criminal. Where such intent is wanting, he commits no offence in law, though he does the act completely within all the words of a statute which prohibits the acts, being silent concerning the intent—and there are cases in which something even more than this is necessary. For example, the Eng. stat. 12, Geo. III, c. 48, § 1, makes it a felony to write any matter or thing, liable to stamp duty, upon paper which had previously been written some other matter, so liable, before the paper had been again stamped, but makes no mention whatever,

whether the intent will be a fraudulent one, or otherwise. Yet it was ruled by Abinger, C. B., that the offence is not committed unless the intent is fraudulent. The doctrine is that the statute is to be so construed in connection with the common law, which requires an evil intent to accompany the evil act as to add, in favor of the defendant, this provision. (1 Bishop, Com. Law, 3d Ed., 429.)"

In the case of U. S. vs. Voorhees, "The Reporter," Vol. XII, p. 713. This section was construed by McKenna, J., saying:

"The other objections applies to both counts. It relates to the want of allegation of intent. It is urged that the punctuation of the statute shows that as to the first three offences stated, of which the charge in the indictment is one, the intent referred to in the second was not applied, but that it applies only to the last offence of false entries in any book, report or statement.

Congress may provide that acts of this character may be punished without allegation or proof of criminal intent, and if such provision is clear, the courts must enforce them; but if the provision is repugnant to the sense of justice and the offence is made very highly penal, as in this case, courts are disposed to give effect to any fair doubt as to the intention.

If it were not for other punctuation on which the district attorney has laid so much stress, there would be no doubt that the intent mentioned would apply to all the offences named. But it is a criminal case, where much is to be allowed in favor of liberty, it is unsafe to rely on a mere matter of punctuation. If these offences were separated only by commas, there would be no doubt that the intent with which the section closes would apply to all its divisions. But we think that as it stands the fair construction of the act must be to make it necessary to allege and prove the intent as to all; and the latter part of the section, which provides that any one who aids or abets an officer in doing any of the acts with like intent, shall be similarly punished. It cannot be supposed that the legislature intended to require more proof against the abettor than was required against the principal; and this part of the statute makes it necessary to construe the preceeding part in such a way as to apply the intent to all of the offences, notwithstanding the punctuation of the sentences. Upon these gronnds the indictment must be quashed."

In Conant's case, IX Central L Journal, p. 129, Lowell J., construing Section 5209, says on p. 130:

"There are several counts. In one, for instance, an embezzlement with intent was charged. In the next abstracting with intent. In the next willful misapplying with intent. It was conceded, therefore, in that case by the prosecuting attorney representing the government, that the intent governed the whole case.

The Court carefully say they do not decide that point, evidently seeing ambiguity and doubt which had not been argued to them, and therefore, perhaps having quite as much weight as if it had been argued, as showing how a person reading the statute would say there was a doubt on this point. But when taken with the original statute, in which there are no semi-colons, and it is taken with the remainder of the section: "Every person who with like intent aids or abets any officer, clerk or agent in any violation of this section." I think the better opinion is—and, of course, we must decide the doubtful points as well as the clear ones—that governs the whole section. * * * So that as to the meaning of the word "embezzle"—taking as I do take, the meaning of the word from the statutes of the United States themselves, it might be necessary (in the opinion of Congress I mean, for I have nothing to do with that) to say that crime could not be committed without the positive intent to "injure" or "deceive," or defraud, for all three words are used, and at any rate as to the two words "abstract" and "misapply" there is an obvious reason for it.

I think I can see why the semi-colons were put in, and that is to meet another argument made that the words "such authority" govern the whole sentence. It is very clear that they do not. This section is carefully parted off by the semi-colons, and by the sense also. Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who without authority from the directors, issues or puts in circulation any of the notes of the association;" and that must be done with the intent to defraud, or injure or deceive, and then repeating the words "without such authority," and it is repeated because they mean to repeat it. "Or, who without such authority issues, or puts forth any certificate of deposit, draws any order or bill of exchange, mortgage, judgment or decree." Now, in the next clause of the sentence they omit the words "without authority," so that it is perfectly clear. I think, from the statute, that whenever they mean to say "without authority," they do say so, and when they do not say so they do not mean to do so. They put these words in twice, and leave them out of all the others and they part off the sentence carefully with semi-colons, so as to show to what portions of it these words are intended to refer, and that is the reason why the semi-colons were put in.

I have consulted Judge Nelson about it, and he agrees with me.

Undoubtedly the intent might often be presumed from the fact; but when Congress sees fit to make the intent part of the crime, I do not think the courts have any right to say it is mere matter of form. So far as "misapplying" and "abstracting" are concerned that is a very important part of the substance.

In the State vs. Reily, 4 Mo. App., p. 396, Lewis, P. J., delivered the opinion of the court, saying:

"While the word 'embezzle' may be said to contain within itself all the elements of a criminal conversion, the adjunctive expression, 'or convert to his own use,' taken literally, might be supposed to define the crime as consisting of any act of conversion, by one of the persons specified, of any property within the descriptive words, however innocent might be the intent. But such an interpretation would be repugnant to to the fundamental principles which sustain even the right to legislate against crime. There can be no crime without a criminal intent. Even homicide, which is capable of implying the the worst of crimes, may yet be not merely innocent, but commendable, by reason of the intent which directs the act. The universality of the natural law which deems no one to merit punishment unless he intended evil, is exemplified by the distinguished law-writer, who says that 'even infancy itself spontaneously pleads the want of evil intent, in justification of what has the appearance of wrong, with utmost confidence that the plea, if its truth is credited, will be accepted as good.' 1 Bishop's Cr. Law, sec. 290. The same writer says: 'In statutory offences there must be an evil intent, though the statute is silent on the subject.' Ibid., sec. 345. An English Statute (12 Geo. III, c. 48) made it felony to write any matter or thing, liable to stamp-duty upon paper on which had previously been written some other matter, so liable, before the paper had been again stamped, but made no mention whether the intent need be fraudulent or otherwise. It was ruled by Abinger, C. B., that the offence is not committed unless the intent be fraudulent. Regina vs. Allday, 8 Car., p. 136."

In the State vs. Gardner, 2 Mo., p. 22, it was held—

"1. An indictment against a justice of the peace for a wilful misdemeanor in office should show such facts as would amount to such misdemeanor, independent of the world wilful; and to make this out, the indictment should charge the act to have been done knowingly and oorruptly.

2. The instrument should allege the fact to be wilful; not that the defendant wilfully did an illegal act; which was held bad on demurrer."

In view of these decisions and the precedents of indictments hereinbefore referred to, we think the omission of the averment of criminal intent to injure and defraud the Association, or some other person "vitiates every count wherein the omission is made."

This objection applies to all the counts from the 37th to the 76th, both inclusive, except count number 74, and also to all the counts from 97 to 116, both inclusive, none of which aver the act complained of to have been done with any intent.

We believe that the same will apply, as before stated,

when we were considering the counts for false entries, (being the first 35 counts and 118th count of the indictment,) all of which aver an intent to deceive any examining agent who might be thereafter appointed by the Comptroller of the Currency, but no intent to injure or defraud.

Unless the intent to defraud or injure the bank, or some other corporation or person existed at the time the alleged false entries were made under Section 5209 there would be no crime, although the intent to deceive the agent might have existed.

To make such an indictment sufficient the averment should be "with intent to injure and defraud the Association, etc., and to deceive the agent," etc.

The object of the statute was not to prevent deception, but to prevent injury and fraud.

VIII.

a.—The thirty-seventh count, and those like it, aver that the shares of stock were purchased by the defendant, as president, with the moneys and funds of the Association and that such purchase was a willful misapplication with intent to defraud, etc. The price paid was considerably less than the par value of the stock. The reasonable presumption of these counts is, that the defendant bought stock for the bank, and as Section 5201 permits the Association to purchase its own shares of stock if it shall be necessary, to prevent loss, upon a debt previously contracted in good faith, such purchase must be held, in the absence of a negative averment, to have been within the exception and therefore legal. In other words the alleged, willful misapplication is charged to have been done "by means of a payment and in manner and form," which was perfectly legal and permissible, under the National Bank Act itself, therefore the additional averment that the act was done with intent to injure and defraud does not render these counts sufficient.

The pleader admits the force of this position, because in the seventy-seventh count, and those like it, he avers the identical purchases of stock by defendant to have been made for the bank; and negatives the idea that the purchases were made in order to prevent loss upon any debt theretofore contracted with said Association in good faith. As the counts represented by counts number 37 and number 59, are

repugnant to and inconsistent with the counts represented by Nos. 57 and 77, being on their face the same purchases of stocks and averred in two sets of counts to have been made by Britton, for himself, and in the other two to have been made by Britton for the bank, the manifest repugnancy vitiates the whole of the said counts, because of the uncertainty.

IX.

a.—In the counts represented by counts No. 57 and 77, which differ only in the averment of the intent to defraud, etc., the stock is alleged to have been purchased by defendant, as president, with the bank's money, at considerable less than the par value thereof, and they contain the further averment that said stock was so purchased and "held by defendant in trust for the use of said Association," but were not purchased in order to prevent lost upon antecedent debts. These averments are not inconsistent with the view that defendant was authorized by the directors of the bank to purchase said stock. If so, there could be no criminal misapplication of the funds. It is true that the bank is prohibited from purchasing or holding shares of its own capital stock, except to prevent loss on *bona fide* debts, and the bank was required to sell such stock within six months of its purchase, but the penalty for disobedience is not denounced against the president or directors, but against the bank itself, and is made a ground for the appointing of a receiver and closing up its business. Section 5201 Rev. Stat. U. S.

X.

a.—The 117th and 118th counts charge that defendant, as president, did make in a certain book, then and there belonging to and in use by said Association in transacting its said banking business, and then and there designated as Journal E, on page numbered 338 of said book, a certain entry in the words and figures following, that is to say: "Profit and loss ex—58.98, dis. 172.99, Com. N. Y. 88. Cash 75,952.66—76,175.51," which said entry purported to show and did in substance and effect indicate and declare that the sum of 76,185,51 was then and there received by said Association on account of profits derived from its banking business; that the entry was false in this that of said sum of $76,185.57—$70,000 was not then and there received

by said Association, as defendant well knew—and false in this that of said sum of 76,183.37, 70,000 was not then and there received by said Association on account of profits, as defendant well knew; and that said false entry was made with intent to injure and defraud the association, as charged in the 117th count, and with intent to deceive any agent who might be thereafter appointed by the Comptroller of the U. S. to examine the affairs of said Association, in the 118th count.

All the objections urged to the first 36 counts apply with redoubled force to these two counts. 1st. There is no averment that the alleged false entry was made in an account showing the business of the bank. 2d. Journal E might have been in use by the bank and yet contained other accounts. 3d. The entry is not averred to have been made in any account whatever. 4th. Page 338 might have been a fly leaf and the entry a mere memorandum. 5th. There is no averment that the entry was made to the credit or debit of any account. 6th. There is no date given and although alleged to have been made June 30, 1876, it is not shown to have had any connection with the transactions of the Bank that day. 7th. The words and figures in themselves are unintelligible—what does "Ex 58.98" mean? what does "dis 172.99" mean? what does "com N. Y., .88" mean? what does "cash 75,952.66 mean? If entered on the credit side of an account they mean one thing, if on the debit, another. 8th. The entry is ambiguous and uncertain and on its face does not mean what the pleader says it "purported to show and did in substance and effect declare—i. e. that the sum of $76,185.51 was then and there received ("*of or by*") said Association on account of profits. 9th. No further proof of the uncertainty and ambiguity of the entry is needed than the two counts themselves. In count 117 it is alleged that it means that $76,185 51 was received OF said Association on account of profits, and in count 118 it is alleged that it means $76,185.51 was received BY said Association on account of profits, and we rsspectfully submit it may mean either, or it may mean neither. If the pleader can't tell what it means, who had the whole entry before him, how can this Court say what it means. The vice is in attempting to single out an entry and charge it as false, without naming the whole account and alleging wherein and what entries are false. If this course had been pursued the court could have seen by inspection what the entries were and how they would tend to deceive or injure and defraud.

b.—The averment that the entry meant that $76,185.51 *was* then and there *received* by said Association on account of profits, and the negative averment, that the money *was* not then and there *received* by said Association on account of profits, limits the time of the receipt or non-receipt of the money to the time the entry was made, to wit: June 30th, 1876, although it might *have been* received June 29th, or any day previous, or July 1st, or within a reasonable time thereafter, the averments of the indictment would be true, yet no crime exist. The receipt of part of the sum is admitted at the time the entry was made. The indictment should have negatived the receipt of the money by the bank at any time, or on any account. We think there can be no doubt that these two counts are defective and should be quashed.

The objections urged to counts 37, &c., apply to count 119, and it is unnecessary to repeat them. We think this count is a fitting supplement to the many inconsistent, uncertain and repugnant counts in this indictment, and shows how entirely the scope of the National Bank Act is misconstrued by the attorneys representing the government in framing these indictments, no words of ours could portray its manifest insufficiency more vividly than the reading of the count itself. We respectfully submit that no one of the 119 counts in this indictment approach sufficiency, and ask that they all be quashed.

GEO. H. SHIELDS,
JOHN B. HENDERSON,
Attorneys for Defendant.